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To view streaming video of this hearing, please click [here](#) (requires Quicktime Player)

Commission Chair John Van de Kamp convened the meeting at 9:30 a.m. in Room 381-B, the Los Angeles County Board of Supervisors Hearing Room in the Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles.

Those present included Vice-Chair Jon Streeter, Executive Director Gerald F. Uelmen, Commissioners Diane Bellas, Harold Boscovich, Gerry Chaleff (for Chief William Bratton), Janet Gaard (representing Attorney General Jerry Brown), Ron Cottingham, Glen Craig, Chief Pete Dunbar, Jim Fox, Rabbi Allen Freehling, Michael Hersek, Sheriff Curtis Hill, Bill Hing, Michael Judge, George Kennedy, Michael Laurence, Judge John Moulds, Cookie Ridolfi, and Greg Totten.

Commissioners not present were Alejandro Mayorkas and Doug Ring.

John Van de Kamp (JVD) welcomed the group.

- I. Introductory Comments
 - A. Purpose of Commission in [Charge from Senate Resolution](#)
 - B. Introduction of [Commissioners](#)
 - C. Examination of [Selected Issues Around Wrongful Conviction](#)
 - D. Today, we are looking at the [fair administration of the death penalty](#) in California.
 - E. We will not be taking a position on the moral rightness or wrongness of the death penalty.
- II. Professors Carol Chase and Chris Goodman, Pepperdine School of Law
 - A. Introductory Comments
 - i. Three professors at Pepperdine, the two testifying and Prof. Harry Caldwell, worked on this project; [See summary of research and outline](#) and also [see full report](#).
 - ii. Conclusion: Reporting requirements should be imposed to systematically collect and make public data about how prosecutors decide to seek special circumstances and the death penalty in murder cases, as well as to gather info on the disposition of these cases, whether they are dismissed, pleaded out, or result in a guilty verdict.
 1. Addendum: Expand reporting requirement to also require data about special circumstances filed, how decisions were made, as well as age, ethnicity, and gender of defendants; and ethnicity of victims as well
 2. Caveat: funding mechanisms should be provided along with reporting requirement

- iii. Question: JVD—who should bear responsibility of data collection?
 - 1. Haven't given much thought to that question; this Commission, if it were to continue, could be a clearinghouse for collecting information, or another body similar.
 - 2. JVD: this Commission will expire on June 30, 2008 by law and we're not equipped to do it. But wondering if AG's office, which is used to collecting data from counties, might be able to do it.
 - 3. That seems an appropriate place.

B. Methodology:

- i. Developed a 2-part survey, sent to all 58 DAs offices in CA
 - 1. Part I—process in individual offices, how they make determination, which 1st degree cases, which special circumstances will be appropriate for seeking the death penalty
 - 2. Part II—gather statistical info to evaluate how death penalty is administered in CA
 - a. specific information as to which special circumstances are alleged in all specials cases
 - b. which of those are pursued as capital cases and which are pursued as LWOP
 - c. statistical info on race, gender, ethnicity of defendants and ethnicity of victims
 - d. isolate factors to determine which factors the DAs themselves weighed most heavily in making their determination
- ii. We did not receive overwhelming response
 - 1. Initially, we sent out a survey in Jan. 2007, to be returned in late February. We had so few responses that we re-sent the survey in April and followed up with telephone calls. Ultimately, the three researchers personally called each office and followed with fax.
 - 2. Responses
 - a. 20 counties never responded at all
 - b. 14 counties said they would not participate
 - c. 5 counties said no death penalty during time period
 - d. 4 counties provided brief summary response by letter
 - e. 15 counties responded to survey

- f. Almost all counties did not provide statistical info from part II or had no way of collecting or maintaining that information.

C. Main Point: we received a distressing lack of response; transparency in process is crucial.

- i. We need access to these statistics to determine if any problems exist and if so, how best to solve them.
- ii. Some of the statistical info is not going to be kept if it's not required to be kept
- iii. Other information, while it can be obtained from the Court records after the fact, there's much information that can't be, such as decisions on the number of special circumstances, which ones to charge and not charge.
- iv. It is very important to keep this data.
- v. Historically, some of the arguments against Prop 54, sought to prohibit the government from collecting racial data. That was defeated. If we don't keep the information, there is no way to know whether there are any geographic, racial, or economic disparities in our application of the death penalty in the State of California.

D. Questions

- i. JVD: some offices have committees or groups involved. What is the ratio of offices that use committee to offices where the DA makes the decision alone?
 - 1. Difficult to come to a conclusion since only 15 offices responded.
 - 2. The majority of respondents took a panel approach. In the smaller offices, it was a panel of the whole, including all the felony attorneys. LA County, which is the largest county with the most number of death cases, has a special circumstances unit to review cases. They willingly seek information from the defense in deciding whether or not to seek the death penalty
- ii. JVD: at what point did you find that most offices made the decision to seek the death penalty?
 - 1. That varied. The offices that did disclose were all over the board, some not deciding until the post-preliminary hearing stages and some deciding prior to preliminary hearing. No consensus or at least none that we could determine.

2. JVD: argument for those who wait is to see how witnesses shake out and will have a more informed decision at that point.
 3. Based on information from LA and informal information from prosecutors who choose not to formally participate in the process, it seems that most prosecutors undertake a fairly thorough investigation, including a lot of psychological and background research into the history of the defendant. The type of decisions being made are not made lightly.
- iii. JVD: AG's office told some of these offices that they should not respond b/c it might impact on pending litigation. Did you find any truth in that?
1. Did not receive in individual responses that anyone was acting under order of AG.
 2. Initially, DA Totten was helpful in developing survey by providing access to a former deputy DA who had experience with charging death penalty cases.
 3. Just before we sent out survey, I spoke with DA Totten who had attended CDAA meeting. He floated survey at the meeting and informed us that there was a negative reaction to survey and that a number of DAs had determined that it would not be wise to respond to survey. Not sure if he mentioned that the advice came from AG or not
 4. Totten: When DAs convened winter conference, the survey was presented to capital litigation committee, which has the AG as a member, but is primarily staffed by experienced death penalty prosecutors. It was a strong recommendation of that committee that district attorneys not respond to the survey because there was on-going federal litigation reviewing district attorney decision-making that would be imperiled by our response to the survey. That is what I reported to Prof. Chase. It came from a committee of line prosecutors handling death penalty cases. The capital case coordinator sits on that committee as well.
 5. JVD: that does not bode well for a data collection program because that's transparency. The situation will be, if we get there, that everything will be out there to be looked at. At some point, that will happen. Also running into this is some of the early concern from DAs about this Commission. That's why Greg and Jim have joined Commission, to

provide balance that Commission needed from the beginning. We've suffered at outset because of that impression and it's been hard to overcome.

- iv. Uelmen: what arguments are presented against making this public data requiring that it be disclosed?
 1. Beyond the response of pending federal litigation, we received responses from District Attorneys that it's up to their discretion. If they had to quantify discretion, they would not be able to exercise it in the most appropriate ways. Other responses were in terms of how they make the decision, about which factors are more important, is that it's an individualized review, and that if they tried to make a list of all the factors they considered, that might be more hamstringing to them.
 2. Other reasons were given that there is no one to keep the data; no time to systematically collect data in some of the larger counties.
- v. Uelmen: did any of the DAs that you contacted have a publicly available policy statement that describes how they make the decision, that describes how they decide to prosecute a case as a death case?
 1. No, three responded and said they have written guidelines for how they make those decisions.
 2. We received one written policy that wasn't very informative and the other two did not provide it.
 3. Most offices said they didn't have written policy, procedures, or guidelines affecting these decisions.
- vi. Freehling: in terms of recommendation, are you suggesting that funding be made available? By whom and how much?
 1. We don't feel qualified to estimate budget and not qualified to say who should pay.
 2. We suggest a central place in California to collect the data from all 58 counties. Without this, it will be difficult to make a comparison geographically as to how the death penalty is being administered statewide.
 3. It could be done less expensively on-line, submitted to AGs office. That wouldn't be that much of an additional financial burden
- vii. Craig: Does CDAA recommend a specific policy on death penalty decisions?

1. Totten: not aware of a specific recommendation of a specific policy by CDAA. Under the constitutional decision of local democracies, it's a decision that is uniquely and very specifically reserved for the discretion of the individually elected District Attorney, as a representative of that community.
 2. Craig: Does CDAA recommend that you have a policy?
 3. Totten: Not to my knowledge
- III. Susan Everingham, Rand Corporation (best viewed with her [written submission](#))
- A. Introductory Comments—data and decisions in the judicial system
 - i. In August 2006, Commission approached Rand about study for cost and administration of death penalty. We recognized problems early on about what kind of data would be available and how accessible it would be.
 - ii. We agreed to start with feasibility study.
 - iii. After interviewing State-level officials and a sample of county-level officials, we concluded that collecting data that we would need to generate defensible cost estimates for the death penalty would be much more difficult and more costly than we had envisioned and couldn't be completed in the time frame that the Commission had hoped.
 - B. Goals of Study
 - i. Our study, had it been concluded, would have addressed many of the questions before the Commission today and we think it could have helped to generate improvements in many judicial decisions.
 - ii. The study would have accomplished four things:
 1. Documented how the death penalty is administered in California
 2. How the administration of the death penalty drives the costs associated with it
 3. Estimated the cost borne by state and local agencies involved in capital and other cases; and
 4. Identified whether any reduction in public cost could be achieved without eliminating steps that guarantee the rights of the accused.
 - C. Methodology
 - i. Underlying any examination of an efficiency of the administration of the death penalty or any public policy is a yardstick. You have to know what you are comparing it to.

1. Because of super due process afforded to death penalty defendants, it's not a question about how much the death penalty costs. It's a question about the magnitude of the cost differential and what drives those cost differences, between LWOP and DP.
 2. The interest of many people is innovations that could speed the process and reduce the cost while maintaining the integrity of the system.
- ii. Study would have been based on two comparisons:
1. How different counties administer the death penalty
 - a. Though offenders in each county are subject to the same state laws, counties operate their processes differently.
 - b. There could be different ways that costs come out on the county side.
 2. How death penalty cases compare to life without the possibility of parole (LWOP) cases
 - a. This comparison would allow us to see how death penalty cases differ than LWOP cases.
 - b. By combining two approaches, we think it is possible to isolate the cost uniquely attributable to the death penalty and understand the differential in cost between both types of cases.

D. Recommendations: Focus my remarks on Question 1—data collection

- i. In order to conduct the study, we would have needed to collect data on public expenditures, including direct and indirect labor costs for all participants in the process:
 1. Include prosecutors, defenders, witnesses, investigators, judges, bailiffs, clerks, court reporters, jail costs, and so on.
 2. Establish the value of a day in courtroom for all the county courts through the California Supreme Court
 3. Collect costs on jail and prison costs, not only building on time defendant spends incarcerated but also the operating costs in jails and prisons.
 4. Not sure if data sources would be adequate and how difficult easy it would be to access the data. That's why we conducted the feasibility study.
- ii. Our inquiries focused on interviewing representatives from a sample of agencies that play a role, state and local, prosecution, defense, courts, and the correctional system.

- iii. Two kinds of approaches to generating cost estimates:
 - 1. Bottom up—develop cost estimates for each of the components and add them up
 - 2. Top down—statistical, look at county and state level budget data, the number of cases, and use an economic approach to determine what the value of those cases were.
 - a. This requires adequate variation in data across time or across jurisdictions.
 - b. If you have adequate variation, you can impute what the cost of each kind of case.
 - c. We concluded that appropriate data weren't available.
 - i. Counties don't always report their expenditure data in a consistent fashion
 - ii. While budget data is available, expenditure data is much harder to get.
 - d. This methodology would not lend itself to a comparison between the death penalty and LWOP.
- iv. We focused on bottom up approach, looking at each cost component.
 - 1. Some can be determined from administrative data, while other components would have required primary data collection by interviewing participants to estimate labor costs
 - a. Some agencies like Habeas Corpus Resource Center only deal with death penalty—that is an easy cost to determine
 - b. Many other agencies are not organized or financed in a way that would facilitate determining costs of death penalty and non death penalty cases.
 - i. In many agencies, local prosecutors and public defenders are responsible for a mix of cases, thus getting the cost estimates is not a matter of taking the total number of cases and dividing by the number of cases because you have to determine an amount of time spent on each of the types of cases.
 - ii. Costs would need to be broken down even further.

1. You can get outside expenses like expert witness fees and out-sourced investigations,
 2. but the lion's share of the cost is the labor costs associated with the attorneys.
 - a. This would be easy to determine if public agencies were required to keep track of how they spend their time, but neither prosecution or defense agencies keep track of their time in this way, or
 - b. If all agencies were organized in a way that all cases of a particular type were in a particular part of the agency, you could add up the total salaries and divide the number of cases.
2. We thought about asking attorneys to estimate cost retrospectively, but we became convinced that they would only generate rough estimates. There are no typical homicide cases. We could learn when the case started and when it finished, but we wouldn't be able to determine how much time within that period a given attorney spent on a case.
 - v. One other concern would be about access to data for cases that are still on-going—which is most cases b/c they are all on appeal. Research access could possibly affect case.
 - vi. Court costs are also difficult to obtain. The principal labor costs are associated with hearing cases and writing judicial opinions. The hearing time is easy to get from the court calendars. Since justices and staffs work on a variety of cases at once and don't keep track of what they are working on when, these costs would also be difficult to determine
 - vii. Corrections data would provide its own challenges. The average cost of a day is widely publicized, but the difference between the cost of a day on death row and other serious offenders is not easy to determine.
- E. Summary—greatest challenge is to gather cost estimates on labor hours, both at the local and state level. We concluded that neither approach would be feasible.

- i. Study revealed one clear fact: inefficiencies in system do affect rights of accused. This study could have shed light on how to address these inefficiencies.
- ii. Researchers get frustrated by dearth of data. In my 20 years at Rand, the importance of understanding cost and efficiency to making good public policy decisions is very clear.
- iii. Number of ways to remedy deficiency
 - 1. Do a study like proposed with adequate time, funding, and commitment of all participants in the system.
 - 2. First step, prepare a pilot study to develop a survey instrument to determine labor costs of participants in system.
 - 3. Alternatively, labor hours and other costs could be collected on a regular basis. This would involve administrative costs associated with administering such a data collection system. We think it could facilitate the type of study discussed today but also improve the efficiency of various agencies in the system.
- iv. Not prepared to make a recommendation today. Careful study on routine data collection is an important place to start.
- v. Many studies at Rand and elsewhere have considered these and other aspects of the death penalty system including aspects focused on racial disparity
 - 1. They all suffer from a serious obstacle. They work from case files and they need to convert case characteristics into quantifiable variables that can then be analyzed.
 - 2. There's no standardized set of rules for constructing these variables.
 - 3. The process of extracting data from case files is very time consuming and expensive.
 - 4. Establishment of a system to regularly collect data about this system, including those where race may play a role, such as the charging decisions, really would facilitate analysis of the workings of the system.
 - 5. Our small effort points to the value of systematically collecting data on how resources in the system are used. This concludes prepared remarks and acknowledge colleagues who helped to prepare these remarks.

F. Questions

- i. JVD: is there a place in the State that would be the best place to collect this info?

1. AG collects some information, but not all. Since they are collecting some of it already, it would be best place.
 2. Local offices would feed AG's office with statewide data.
 3. JVD: problem is to get local prosecutors to support this effort.
- ii. Fox: my understanding is that all DAs offices deal with a budget. If a death penalty case comes into office, are you aware of any county where budget is changed, where money is added to budget, to handle case?
1. No one provided evidence that that's the way the process works.
 2. Fox: there are provisions under state law where small counties can obtain money from the State for extraordinary costs associated with prosecuting homicide cases.
 - a. Most medium to large counties don't have a budget change for capital cases.
 - b. What are we trying to determine if the cost to the prosecutors doesn't change?
 3. Everingham: The overall costs to the prosecutors' offices might not change, but the opportunity costs to individual DAs in office might vary. If the attorneys are focused on death penalty cases and they aren't focused on other types of cases, there are costs associated with that. What this study would have teased apart is what fraction of the overall cost when to death penalty cases as opposed to other kinds of cases.
 4. JVD: we've heard testimony on other costs in system including habeas costs, investigation costs, prison time, special incarceration provisions that have to be made.
- iii. Uelmen: New Jersey Commission study determined cost of confining someone on death row was twice what it cost to keep someone in prison for one year. They concluded that each death row inmate, over the life of that inmate, was costing the State \$1 million per year. If we extrapolate those statistics to California, we're talking about \$650 million per year to house death row. Were you able to ascertain at all from the department of corrections the differential between confinement on death row and confinement in a high security prison?
1. Not in pilot study. In pilot study, we looked at how hard it would be to get that type of information.

2. We looked at publicly available data but found that the difference was not published anywhere we could find it.
 3. We started having conversations with officials in the Corrections system and found out that to collect that information, we needed to collect detailed data to figure out labor associated with the extra security provided on death row and whatever is different about death row inmates vs. other inmates.
 4. We didn't gather those costs. We learned that such data would have to be collected by digging, as opposed to looking at a data set and analyzing it or looking at a data set analyzed by someone else.
- iv. Judge: were you able to determine whether or not there was any difference in death cases in terms of resources applied, e.g. two lawyers for defense or prosecution rather than one; additional experts than a typical case?
1. Interviews suggested that there was great variety in those factors which is why we would have to collect that data in a comprehensive fashion to make generalizations that would apply statewide.
 2. We weren't able to determine what those costs would be, but of course the costs would be more if you had more attorneys working on death cases.
 3. We learned that there is great variety, no standard rule applies across counties, and that we would need to collect that data in a very systematic way for it to be able to withstand scrutiny.
- v. Hing: It is difficult to estimate attorneys' costs. What was said earlier by Jim Fox about DAs budget could be said about public defenders offices. As far as appointed counsel for the appellate work, isn't there a record of requests that are made for more funding by the appointed counsel? Isn't there a body of data that could be tapped?
1. Nobody could point to a database that could give all information.
 2. But that information is collected by Courts because those counsel need to be paid. So someone is collecting information in order to write checks.
 3. We assumed that we would be able to find that data and gather it. That's one piece of data on the system. The other

pieces we weren't going to be able to get without directly accessing information collected from the local agencies.

IV. John Philipsborn, California Attorneys for Criminal Justice and the Mexican Capital Legal Assistance Program

A. Introductory Comments

- i. I submitted [a statement](#) while I was trying a case. The statement is incoherent, but my recommendations can be more clearly stated. [SUBSEQUENT TO THE HEARING, MR. PHILIPSBORN SUBMITTED AN [ADDENDUM](#). IN ADDITION, THE PUBLIC DEFENDER OF TULARE COUNTY AND MR. PHILIPSBORN EXCHANGED [LETTERS](#) REGARDING HIS TESTIMONY.]
- ii. I'm addressing three focus questions:
 1. Qualifications—are qualified lawyers being appointed and what can be done to make sure that qualified lawyers can be appointed? I'm restricting my comments to the trial level.
 2. What can be done about the adequacy of funding?
 3. Are there geographical differences in the way counsel and funding issues are addressed?
- iii. I come to you differently than the researchers and the representatives from institutional offices.
 1. Other than briefly being a public defender, I've been a private practitioner for my whole career.
 2. I've been involved with two organizations, California Attorneys for Criminal Justice—CACJ (one of the two major statewide organizations of criminal defense lawyers, and the Mexican Capital Legal Assistance Program that happened to get involved in impact litigation.
 3. Early in my career, I was amicus chair for CACJ
 - a. I would hear from public defenders who were experiencing staffing problems in connection with capital cases.
 - b. I heard from private lawyers raising concerns about ancillary funding
 - c. I heard about defense organizations expressing concern when public entities, e.g. public defender offices, started going to glass partition motifs, i.e. a public defender was head of indigent defense service in a given county and while there was a nominal partition between public defender, alternate defender, and private defense bar, there was one administrator

responsible for budgeting and budgetary decisions, with respect to individual cases.

- d. Heard from people in contract defense counties where lawyers bid depending on complexity of case that there were a number of different formulas in these contracts. Contracts have been an emergent way of dealing with burgeoning costs to counties of death cases. They've also been problematic
 - i. Lawyers haven't been compensated
 - ii. Lawyers haven't been able to access additional counsel
- e. I've litigated in more than 28 counties, in addition to 10 counties in which I've personally handled California death penalty cases. I've also litigated in the federal system and have some idea of the funding mechanisms there.

B. Recommendations

i. Focus Question—issue of qualifications of appointed trial lawyers

1. We need to know about the qualifications of lawyers

- a. We have a board of legal specialization in California that gets applications from people who want to be specialists.
 - i. The applications are reviewed every five years.
 - ii. If you get your specialty certificate, which is less important in the institutional offices, even though DAs and Public Defenders are certified specialists.
- b. We have Bar Associations that administer panels that request statements of qualification and continuing education, but we have no systematic way in California to ensure that qualified lawyers get on these cases.
 - i. Often no record is made at the trial level of how qualified an individual lawyer is
 - ii. On occasion, that becomes the subject of review on habeas, not methodically from what I've seen.
 - iii. It has come up in some federal cases
- c. If we are concerned about qualifications of lawyers, we should know about them.

- i. One way of knowing about them and making the records clear as to whether lawyers meet ABA qualifications or State Bar qualifications
 - 1. In 1994, the State Bar of CA resolved to incorporate the ABA standards into aspirational standards of state
 - 2. We have no methodical or centralized way to know about qualifications of counsel.
 - ii. Commission could make recommendation on this subject
- 2. There is only one set of standards that governs, not only qualifications of counsel, but management of right to counsel in capital cases. Those are the ABA standards.
 - a. The Federal Courts make reference to them somewhat jealously and occasionally by the State Courts in CA. That's proven to be a problem when public defenders' offices, for their internal management reasons, choose to assign one lawyer to a death-qualified case on the basis that the case will only get a second lawyer if it's adjudged by a supervisor or by the public defender that it's actually going to be a death case.
 - b. The question becomes: when do you effectively represent a person who is death eligible?
 - i. In my practice, I've met with Mr. Fox and the committee he chairs in San Mateo County.
 - ii. He expected that I would be prepared to discuss facts of case and background of defendant.
 - iii. We met early in case. If there had only been one lawyer assigned and there hadn't been adequate investigation done early in the case, he wouldn't have received a lot of information from us.
 - c. The reason the ABA standards require that once a case is legally death-eligible that it be worked up as a death penalty case is that a lot of justice in our system is discretionary justice. It's decision-making by the executive branch that in the end resolves not to pursue a death case. The room for intelligent input by defense counsel is made a lot narrower in counties

that decide not to adequately staff or fund the defense function early on.

- d. Commission should encourage adherence to ABA standards
 - i. Such a recommendation would also influence case law in state of CA that disadvantages adherence to ABA standards
 - ii. Our Supreme Court has ratified discretionary appointment of second counsel in death penalty cases, leaving it in the cases that have filtered through the process to the federal courts, to make decisions on whether or not it was violate of the 5th and 6th amendments and the 14th amendment for the State to deprive the accused of second counsel.
- e. JVD: should State Bar be doing more to educate lawyers about ABA guidelines or promulgate regulations that are stronger than today?
 - i. Yes, they could.
 - ii. I reviewed the State Bar's actions in this regard.
 - iii. In 1994, the Bar took action to shine light on old ABA guidelines for the appointment of counsel in death penalty cases.
 - iv. It hasn't been done recently with the 2003 guidelines.
 - v. That would be an apt recommendation as well.
 - vi. This Commission is in a good position to influence that.
- f. Part of the question of qualification of counsel has to do with what you're talking about when you're talking about counsel.
 - i. I emphasize that there is a good reason for appointment of two counsel in death penalty cases.
 - ii. There's literature on point as well as a detailed explanation in the ABA literature.
- ii. Focus Question—what can be done about adequacy of funding?
 - 1. As we move from qualifications of lawyers into funding, one of the aspects of these cases that has really been troubling is the management scheme put into place that

discourage the appointment of two counsel that cause people to make strategic, tactical, and case-management decisions that are exclusively money-driven.

- a. In contact situations in which by contract the ceiling for expenditure of second counsel is two-thirds what it is for first counsel, there's a differential in pay, there's the encouragement for second counsel to not be a full participant in the defense, that may make sense in certain cases.
 - b. In other cases that involve complexities in which there is a division of labor between trial counsel handling guilt phase and trial counsel handling the penalty phase, or where one lawyer is an expert on DNA and forensic evidence and the other lawyer has other expertise, some of the funding formulas are crippling. It's surprising that very few of the reported cases in CA have exposed that problem. It will be exposed to a greater degree in the Federal litigation
2. I urge you, when it comes to funding, to look at the ABA standards and to take a look at the contract systems, the fee cap systems, at the systems in which ancillary funding decisions are offloaded
- a. I provided the example in [my statement](#) of Tulare County.
 - b. The same issue is about to be discussed in Santa Clara County on Monday. The County Counsel is being proposed to be the administrator of the indigent defense funding apparatus. Having a county functionary who's making decisions about funding of cases and awarding of ancillary fees is violate of CA's legal architecture, though few courts have been asked to do anything about it, it also cripples the defense function.
 - i. In Tulare County specifically, there have been situations in which persons, representing Mexican nationals, asking for mitigation specialists, asking for the ability to conduct investigation outside of the US, asking for Spanish-speaking investigators, are being turned down.

- ii. This is not because a judicial officers who by law is supposed to be making these decisions is making them, but because a contract administrator is making them.
- iii. Lawyers who challenge that system, at least two of them have been thrown off the appointments list and some are not paid to seek appellate or writ review of these cases.
 - 1. This explains why organizations like the Mexican Capital Assistance program and CACJ get involved.
 - 2. This also explains the disaster areas have percolated to the top because there isn't much room for this type of litigation.
 - 3. This explains why a fairly well-known capital case lawyer, whose training was in Texas, who founded the Mexican Capital Assistance legal program, pointed out that at its best, CA is one of the best jurisdictions, but at its worst, CA is one of the worst places around.
 - 4. It can be worse than the "death-belt" jurisdictions in part because the cost of doing business is higher here but also because in some of the forgotten counties, the funding of the defense function is pathetic.
- c. That kind of encouragement from the Commission would be important.
- 3. One mechanism to consider that comes out of federal case administration is whether we should encourage a notice requirement, whether by Court rule or statute.
 - a. Is there a point at which notice must be given by State that death is being pursued?
 - i. The games that are being played, the Administrative decision-making games on second counsel and ancillary funding can terminate.
 - ii. JVD: at what point should notice be given?

1. At federal system, it's given relatively early, after a fairly early decision-making has occurred.
2. At state level, it should occur in short time after preliminary examination so that defense can gear up to present a meaningful defense.
- b. In counties in which there is no problem, it isn't a problem. But in counties in which it is a problem, you really get fairly aberrant results.
4. Commission should encourage state to adhere to its own statutes
 - a. There is a statutory mechanism to determine the adequacy of funding given the complexity of a certain case and the needs of a certain case.
 - b. Contract system, by definition, does not adhere to that formula, especially if the contract system doesn't pay by hour but by case unit.
 - c. No way of knowing if people are adequately compensated for work they are supposed to be doing and no way of knowing what work they are doing because contract system deprives decision-makers about what kind of work is doing into system.
5. Encourage state to fund ancillary funding budget
 - a. Small counties do have ability to tap state funds, but a number of counties compete for a small pool. They point to one large case to justify tapping into state system while struggling to fund defense function in capital cases.
 - b. Some attention should be paid to that.
6. When it comes to issues of appointment of counsel and ancillary fees, it should be clear that this is a judicial decision, not by an administrator under a system that makes it very difficult for counsel to seek effective review of the administrative system.

C. Questions

- i. Freehling: assuming we followed your recommendation in trying to standardize the appointment of two attorneys, what is the most compelling reason why we should do this?

1. The most compelling reason has to do with the format of a death penalty case
 - a. In a death penalty case, unlike most cases in which persons are called on to defend, there is, by virtue of judicial decisions on death penalty, there is a concentrated and detailed inquiry into a person's background
 - b. There is also an inquiry into where that person fits into the greater picture of liability, criminality, moral responsibility, etc.
2. At the same time, there is a more detailed inquiry than usual into crime facts.
 - a. Very often, the forensic issues in homicide cases can be complex as well, especially in multiple murder cases, cases in which the prosecution brings forth a number of forensic science resources. The complexity and nature of the case warrants two lawyers.
 - b. From a practical viewpoint, no lawyer has only one case. This permits the defense to actually provide adequate counsel.
- ii. Freehling: does your recommendation help to alleviate the problem of the lack of level playing field wherein a wealthy defendant usually gets the best defense and gets removed from the list of possible death penalty eligible whereas indigent defendant does not have that, therefore leading to a death row full of more indigent?
 1. The question is beyond the scope of my knowledge
 2. My experience is that reality of resources brought to bear in death penalty case usually exceed the pockets of most of us. Only the wealthy of wealthy can put on a certain type of defense
 3. To meet the challenge put forward by a death penalty prosecution, the cases are well-investigated, sometimes by multiple agencies, and they provide the most complex types of problems.
 4. Without funding to meet the problem, you're hard pressed to level the playing field.
- iii. Hill: Santa Clara County considering having County Counsel oversee cost of representation? Is that relative to capital cases or budget in general?

1. Having spoken with one of the administrators of the program yesterday, there is some lack of clarity
 2. Not sure that they knew.
- iv. JVD: what got you into Tulare county as a specific site for most of your work?
1. Career going nowhere (laughter).
 2. At time case was being focused on as lead case defining mental retardation (the Vidal case), I was first involved as CACJ amicus lawyer and then on behalf of the Mexican government, I looked at the issues in Tulare. I went about looking at the contract and other information that I've relayed to the Commission.
- V. John Poyner, District Attorney, Colusa County; President, California District Attorneys' Association (CDAA)
- A. Introductory Comments
- i. DA of Colusa County, on 6th term; president of CDAA
 - ii. Colusa County is located 60 miles north of Sacramento on I-5, population of 25,000; even split between democrat and republican; 48% Hispanic population; avg. 1 homicide every 2.5-3 years
 - iii. I've worked on 4 death penalty cases. My first was as a defense attorney. I believe I'm the only DA in the State who's been on both sides of this issue.
 - iv. There are problems with the death penalty, but I don't believe those problems are at the front end of the death penalty. Consistently, the elected DAs make good sound judgments when exercising their discretion.
- B. Recommendations
- i. Focus Question #1—collection of data
 1. I don't have a problem with it.
 2. I am not clear how we would go about doing it, but I don't have a problem with it.
 - ii. Focus Question #2—appellate courts looking at death cases
 1. When this was first proposed by Chief's recommendation, I sent it to capital litigation committee for input.
 2. A third of those on the committee thought it was a very good idea. Another third were neutral. The final third were opposed, because of the make-up of the District Courts of Appeal (DCA). Some DCAs are more conservative, like the 3rd, others are more liberal. Some of the capital attorneys had reservations.

3. As long as Supreme Court is taking a position of overview of the DCAs, I don't see any problem with the Chief's proposal.
- iii. Focus Question #4—narrowing special circumstances
1. I agree with many defense attorneys in this area, to the extent that with one exception I don't think there should be any more special circumstances.
 - a. The one exception I would have would be for the 1st degree murder of a child under 14. That's not without precedent because we have other special circumstances that cover prosecutors, judges, fireman, police officers, and other elected officials. It seems that one of our more precious resources, children, should have that cloak of protection.
 - b. But I do agree, with that one exception, that we don't need any more special circumstances. We have enough.
 2. Should person who receives death penalty be actual killer?
 - a. No, I don't agree with that at all.
 - b. I cite two quick cases
 - i. Charles Manson
 - ii. Clarence Ray Allen—from his prison cell, he directed the killings of three people, carried out by Billy Ray Hamilton. Allen's intent was that he was hopeful for a new trial and he didn't want those witnesses to testify. He never pulled trigger, but should still be death-worthy. You shouldn't have to be the actual killer.
 3. Should felony murder special circumstances be retained?
 - a. This question is intertwined with the last.
 - b. Felony murder rule is one of the more important we have.
 - c. One of the death penalty cases I did was a robbery-murder. The victim stopped at an I-5 rest stop. He was on leave from the military. The Defendant had a rap-sheet the size of the San Francisco phone book. The felony-murder rule was the only way I could get the death penalty on that individual.
 4. Should we limit this to the worst of the worst?

- a. Yes, that is exactly what the elected District Attorneys are doing.
 - b. We are looking at the special circumstances and we are limiting it to the worst of the worst.
 - c. Merced County had 150 murder cases in the last 10 years. Only 2 were filed as death penalty cases. I believe you'll find that's consistent across the board.
- iv. Focus Question #5—appointment of counsel
 - 1. Mr. Phillipsborn covered this adequately and I agree with what he had to say.
 - 2. Most reversals of death penalty cases are the result of jury instruction error. That could be the fault of the judge, the defense attorney, the prosecutor, or any combination.
 - 3. The second most common cause of reversal is the ineffective assistance of counsel (IAC). That is not the fault of prosecutors, it's the fault of defense attorneys.
 - 4. To my knowledge, there has not been one death penalty conviction reversed because it was found that the defendant was factually innocent. That shows very solid, good discretionary judgment on the part of DAs as they make these tough decisions.
- v. Focus Question #6—consistency of representation
 - 1. Not qualified to answer
 - 2. The Attorney General's office for rural counties does all appellate work and all habeas work
- vi. Question #7—is funding adequate?
 - 1. No. Why? Rural counties do not have public defenders, instead there are contract private attorneys who do public work. Public defender caseload plus private practice. When they sign their contract with the county, there is a specific clause for extra compensation for death penalty case b/c it takes them away from private practice. That's fair; that's how it should be.
 - 2. DA Fox pointed out that rural counties have a fundamental cap (\$250,000), then state will reimburse the small counties for 80% of what goes over that amount.
 - a. On four death penalty cases I worked on, not one hit that \$250,000 mark.
 - b. That money came right out of the general fund.
 - c. That has a trickle-down effect in rural counties.

- vii. Question #8—racial disparities
 - 1. In three of my cases, both defendant and victim were white; in fourth, a Hispanic gang enforcer killed a black task force officer
 - 2. DAs look at cases based on facts, not color, race, ethnicity. I would be happy to look at police report without looking at race. That has nothing to do with my decision
- viii. Question #9—geographical disparities
 - 1. As far as geographical disparities, of course they exist.
 - 2. Rural counties are traditionally more conservative than urban areas. For example, we don't have colleges and universities. We have a different work force. We have a different economy. We work at a different pace. There are going to be geographical differences.
 - 3. If DA is abusing or not using his discretion properly, then it's up to his constituents to make that decision, not an oversight or review committee.

C. Questions:

- i. Judge: you mentioned that you personally had no problem with collecting data; the only question was how would it be accomplished. Are you saying that as President of CDAA or as DA of Colusa County?
 - 1. I am speaking on behalf of a rural county.
 - 2. My answer is based upon being elected to Colusa County.
- ii. JVD: at the beginning, you suggested that the major problems were down the line, not at the local level. Where are the hang-ups in the administration of the death penalty today?
 - 1. I don't think the problem is the District Attorney making the decision. Once they decide they have to make it, they make it.
 - 2. Now the problems start:
 - a. When will we get appointed counsel?
 - b. How many appointed counsel will we get?
 - c. What will the discovery process be?
 - d. Once you get the conviction, all the appeals processes. The habeas corpus process.
 - e. It goes on and on and on. These are the areas of problem, not the elected DAs making the choice take a case as a death case.

3. I don't see elected DAs abusing their discretion in deciding whether to go forward with the death penalty.
 - a. Instead, I see DAs having sleepless nights, calling other DAs, running facts by them, having your own committees.
 - b. I don't have the luxury of a committee. I have 1.5 lawyers that work for me. So do I make this decision by myself? No. But I'll call other DAs around the State and consult with them. That's what small counties do. We don't have these luxuries.
 - c. We do fix it on the front end, but it's from there on that I see the problem.
- iii. JVD: in cases you dealt with, do you talk to defense counsel on a normal basis about defense version of case? Is that taken into consideration before you make the decision?
 1. In my case, yes I do. I have lunch with Chief Public Defender every morning at one of my favorite Mexican restaurants.
 2. I tell him when one of these cases is coming down the line. I provide it to him up front because I know he's the one who will be appointed to it. I have that luxury up front. I listen to his input and let him take the time to read it. The victim is already cold; I can take my time to make the decision.
 3. That luxury is not necessarily afforded to medium and large counties because they do not know who will be assigned.
 - a. It seems unfair to have the Public Defender in those counties have to come in and talk to DA who may have had benefit of committee, when the defense attorney does not have that advantage yet to give proper mitigation input.
- iv. Ridolfi: you mentioned that there are problems with IAC, which stem down later in the process. What do you think it would take to correct the problem, to have a more functional death penalty system in CA?
 1. One of the problems is what John Philipsborn suggested: we need to get more competent attorneys to take these cases. It's hard to do a case on the appellate level.
 2. Last case, we waited 4.5 years before defense attorney was even appointed to start the appeals process.
 3. It's unfair to everyone, including victims' family.

4. Maybe we should look at ABA rules.
 5. It all boils down to money.
- v. Uelmen: is that money at front end or back end? If cases are being reversed because of IAC and most of those IAC claims are based on lack of investigation that there was mitigating evidence that lawyer didn't find and didn't present, so we go back and start over, but the problem was that we didn't spend enough money initially so that the defense attorney would have found that mitigating evidence?
1. My front end is the DA making the decision to file a death penalty case or not.
 2. That doesn't cost anything because we are already paid. Whether we have a death penalty case or not, there is no increase in cost for that decision.
 3. After that is where the problem is. If the Court is not adequately funding the defense attorney appropriately so that they can do investigation and find mitigating evidence, then there is a problem. That require leg work and funding which all boils down to money.
- vi. Totten: You mentioned your four cases that you were personally involved in. Based upon your experience, were those cases aggressively and competently defended?
1. Yes, especially the one on which I was defense counsel!
 2. I'm in favor of the death penalty, but yes, I thought all of them were adequately defended.
- vii. Freehling: appreciate your humility. Considering everything that goes sour during that 4 year period, why does it take so long to appoint an attorney on the appellate process?
1. That's primarily because there are not enough qualified attorneys to fill the need.
 2. JVD: it depends partly on an aging base of lawyers and limited pay to attract counsel. It's true both in initial appointment process as well as habeas process.
- viii. Uelmen: Pepperdine study reported that it had one capital case in the 10 year period it looked at. Are the three cases that you're referring to go back prior to the 10 year period?
1. First was in 1983, as a defense attorney.
 2. The last two, one came in last year and I changed the venue to Merced County and I actually sat second chair.

3. The one before that was a police officer killing, which was a year before.
4. The one before that was also a police officer killing in Tehama County that came into Colusa county on a change of venue. Both elected DAs asked me to sit second chair. I reviewed the entire cases and read everything. I sat in with them and believe that the charging decisions they made were appropriate ones.

VI. Mike Ramos, District Attorney, San Bernardino County

A. Introductory Comments

- i. Representing larger counties in CA
- ii. San Bernardino has a population of 2 million; different issues regarding death penalty cases.
- iii. This is the most serious decision we make as elected DAs. As a trial lawyer, I tried 4 of these capital cases. We don't make these decisions lightly. I have lost sleep about appearing here today b/c of how important this issue is to DAs in California and how important it is for me to represent the larger counties.
- iv. Why lose sleep?
 1. I truly believe that what we do with our discretion given by the Constitution and the CA Gov't Code is ethically right.
 2. I haven't met one DA who hasn't done that.
- v. Procedure in San Bernardino
 1. I have the luxury of a bigger office.
 2. When we have a death penalty or special circumstance case, trial lawyer brings it to 5 chief deputies who have experience with capital cases, 2 assistant DAs, and of course the final decision is mine.
 3. We look at all factors, including guilt phase, evidentiary issues we have, how strong the guilt phase is. Why? Because we are asking 12 citizens of community to take someone's life.
 4. The second part is to look at §190.3 factors—aggravating vs. mitigating. We give both sides the equal weight they deserve.
 5. In 2007, we reviewed 90,000 cases. We filed 70,000. 20,000 of those were felonies.
 - a. There were 142 murders
 - b. One third were death penalty eligible and we filed one death case.

- c. The person who broke in to commit felony residential robbery slashed throat of woman who lived in home. She survived, but before he left the robber killed the victim's mother. Add the person's prior history and we decided it should be the one case in San Bernardino County that should be a death case.
- d. If you throw out the felony murder rule, we lose that.

B. Recommendations

i. Why didn't we respond to Pepperdine survey?

- 1. I was one of the counties that did not respond. The preceding facts are the reason I give you, the procedure we use and how serious we take this responsibility, because we hold responsibility near and dear to heart.
 - a. If we give you detailed public information about the decision-making in every case, that exposes the process which will chill the use of the death penalty across the State on who does and doesn't get the death penalty.
 - b. It may even go backwards. Some groups, law enforcement agencies and victims' rights groups, will ask why death penalty will not be filed.
 - i. It's a huge work-product discretion.
 - ii. The minute we open the door, the defense bar will make more motions, writs, and appeals.
 - iii. Everything we are trying to resolve on the back end will be increased and get worse.
 - c. This discretion is given to us by the Constitution and we are using that discretion in a professional manner.
 - i. We should not have to put all the factors out in the public.
 - ii. We're not hiding the process; you can see facts of each case when each case is filed.

2. Other issue

- a. I'm speaking as the San Bernardino District Attorney.
- b. With all respect to this panel and Commission, former Sen. Burton appointed the panel.
- c. When people of San Bernardino County elect me to represent them, I am moved by legislation or people that are indicating, whether it's the Attorney General's office or the Governor's office, questions

and issues framed in that format, I have to be real careful about what information we share to institutions, educational or otherwise.

- d. It's not that we are hiding anything. We just have to be real careful about that.
- ii. Delays in process are affecting not just the defendants, but affect others.
 1. Two mothers will speak later on:
 - a. Linda Hubbard lost a 7 year-old daughter in Ukipa in 1980 to a defendant named Lucero. She's been struggling through process while they're waiting the death sentence for that murder.
 - b. Ms. Marianne Hughes lost an 11 year old son to Kevin Cooper, who escaped from Chino prison. She's attended appellate hearing after appellate hearing for 25 years, waiting for this person to be held responsible for killing her loved one.
 - c. They'll tell you about frustration with process on the back end.
 2. It's not just victims' families, but it affects people on death row.
 - a. People on death row are affected and frustrated by appeals process.
 - b. [Innocent Man](#) book which involved an innocent person on death row.
 - i. After reading, I wanted to make sure that we are not doing the things in that book.
 - ii. We wouldn't have even filed the murder case, let alone put people on death row.
- iii. Racial issue is offensive
 1. We never consider color in trying death penalty cases.
 2. Last death penalty case I tried was white defendant who murdered African American female security guard at youth authority. It wouldn't have mattered if it was the other way around.
- iv. We have problems with the end result of the death penalty, but I believe strongly that there should be a death penalty. The voters haven't changed their mind. We will continue to use our discretion as file these cases and get them through the system.

C. Questions:

- i. JVD: number of filings where death penalty is sought, special circumstances and going for the death penalty, has dropped in the last few years. Do you have any reason for that?
 - 1. In our county, we have 10 death penalty cases pending countywide. 8 have been made since I was elected DA in 2003.
 - 2. It goes to the ultimate decision we make to take someone's life, which must be done carefully.
 - 3. There are people who second guess us and say we should have given the death penalty to certain people when we should not.
 - a. #1, we want to make sure that guilt phase is very strong.
 - b. #2, when you balance the aggravators and mitigators, you should have no question about guilt and that the person deserves the death penalty.
 - 4. That's why we see such a low number of death cases.
- ii. Ridolfi: you agree with Mr. Poyner that delay is a significant problem. Can you think of another way other than spending a whole lot more money to address the problem?
 - 1. We need to look at the appeals process.
 - 2. One of the way we've talked about in San Bernardino is to certify the record at the trials in Superior court.
 - a. In last death penalty case, it took 1.5 years to certify record.
 - b. If we can get a certified record at the local level, that would be more efficient.
 - 3. Ridolfi: that also costs a great deal of money. Are there other ways to help the problem that won't cost money, such as limit the special circumstances?
 - a. I can only give a general comment about money.
 - b. When a DA is deciding the death penalty and deciding for a victim's family who has lost a loved one, it's hard for me to think about money. I know it's reality, but there are no decisions I know made on our level regarding that financial issue. The money should be in place if we need to do that.
- iii. Fox: regarding number of death penalty cases as declining, we have also experienced a dramatic reduction in career criminals.

1. In 1982 when I became DA, we had 3 full time deputies to do career criminals.
2. We don't have enough cases to have one.
3. Many of the people targeted under 3 strikes that would have qualified under death penalty are now doing 25 to life under three strikes.

iv. Uelmen:

1. Number of pending death cases in San Bernardino County 10, correct? Yes, there are 10 pending with one currently in trial.
2. Uelmen: That is significantly lower than in prior years?
 - a. I don't believe so.
 - b. In prior years we were between 10-12.
 - c. In years before, when I was doing trials, there was a team of three of us with a caseload of 3-4.
 - d. Number of three strikes cases has gone down tremendously.
3. Uelmen: is the number of actual death judgments down because juries are more reluctant to impose death? In last 3-4 death penalty cases in San Bernardino, the jury returned death verdict
4. Uelmen: do you have a written policy available that describes how you make the decision to file a case as a death case? No, as I indicated earlier, it's an internal policy between me and my staff.

v. JVD: do you talk to defense counsel?

1. Yes, we give them the opportunity.
2. In our county, there is a list of defense attorneys that have been trained and had special circumstances cases.
3. There's also a team in the public defenders office.
4. When a case is submitted, all know that they can submit mitigating facts to us. Some take advantage of that and some don't.
5. But we don't delay our process on those that don't, knowing that they have that opportunity.

VII. Dane Gillette, Chief Assistant Attorney General, California Attorney General's Office (best viewed with [his written submission](#))

A. Introductory Comments

- i. Served as Attorney General Lockyer's representative to CCFAJ for about a year and a half; happy to be back with Commission

- ii. Chief Assistant for Criminal Division for the past year; for 15 years prior I was State Capital Case Coordinator for the Attorney General, responsible for supervising 12 of 13 executions California has had since CA began executions in 1992 under the current statutory scheme.
 - iii. Handled a number of cases myself, from appeal through various phases of state and federal habeas corpus, including Donald Beasley, a case which resulted in execution that was out of San Mateo county.
 - iv. Also a member of board of directors, and Past President, of the Association of Gov't Attorneys in Capital Litigation, which is a national organization of local, state, federal, and military prosecutors specializing in death penalty prosecution.
 - v. AG's office is responsible for representing people of CA in criminal appeals and collateral challenges in state and federal courts. Substantial portion of our load is in capital cases. It is our responsibility to defend the constitutionality of the death penalty and the judgments of death that are returned by the juries in counties where they are charged and tried by the district attorneys.
 - vi. AG's office takes no position on whether CA should or should not have a death penalty. That is a political and policy decision left to the Legislature and the Electorate. It's important to emphasize as the Commission considers many of the proposals for reducing or eliminating special circumstances or even eliminating the death penalty altogether, is that our current statutory scheme was enacted by initiative in 1978 and any change, modification, or reduction of the special circumstances or even its elimination would have to be approved by a majority of the electorate in a general election.
 - vii. AG's office is committed to ensuring that the criminal justice system is just, fair, and accurate, not just for those who are charged with criminal acts, but for the victims of crimes, particularly those who are most vulnerable, the elderly and children.
 - viii. Evaluation of CA's death penalty procedures must involve consideration not only for the defendants in the system but for the victims of crimes as well. Fairness of the system must not be judged just by how we deal with our worst offenders, but how we respond to and protect society from them.
- B. Recommendations—we submitted a [written response](#) addressing the focus questions. I won't go over all of them today, but just touch on a few:

- i. With respect to Chief Justice’s proposal that the Constitution be amended to allow the discretion to transfer a certain number of cases for oral argument and appeal to the DCAs...
 - 1. We recognize that there are details to be worked out.
 - 2. AG’s office believes this proposal is worthwhile and warrants further review. Authorizing the Court to make those transfers makes sense. We can reduced capital case backlog without reducing accuracy. Some have said that this may not be a successful approach. If that’s the case, the Court could cease transfer.
- ii. With respect to State habeas corpus focus question...
 - 1. Best long term solution to state habeas corpus practice, not just in capital cases but in all cases, would be enactment of a comprehensive post-conviction remedies act.
 - 2. Such an act would require a limitations period for filing of petition and requirement that it initially be filed in trial court. This would allow development of factual record in trial court and before trial judge who had heard case before, a timely presentation of info and an opportunity to create a full record.
 - 3. This is standard practice in many other states.
 - 4. Absent enactment of comprehensive post-conviction remedies act, we agree with the suggestion that the habeas petitions in capital cases should be filed initially in the Superior Court, which allows for development of record more quickly and a full record of the facts where it’s appropriate to have an evidentiary hearing before the trial court and a record that the Supreme Court could review.
 - 5. Hopefully if this is done in a reasonable time frame, it could bring the two together, the direct appeal and collateral review.
- iii. With respect to funding and appointment of counsel issues...
 - 1. AG’s office should not have involvement nor should DAs offices have say in appointment of counsel or funding.
 - 2. Funding should be made at a level that ensures defendants receive adequate representation, including investigation resources necessary.
 - 3. Funding information—§987.9 of penal code allows appointed counsel to obtain fees for investigation fees, money to pay for investigators, experts, etc.

- a. Those are applications made confidentially by the defense attorney to a judge other than trial judge. They remain confidential.
 - b. We rarely see them and occasionally are given access only in cases where there is a challenge to the amount of money or the tactical decisions that were made by the defense attorney.
- 4. CA supreme court also provides for sealed applications for funding of investigations in the capital habeas cases. The Commission may benefit from seeking in some form, from the superior courts or the supreme court, copies of the §987.9 orders or the CA Supreme Court payment orders to get a better sense of money actually spent in these cases.
- iv. Issue of proportionality review and data collection...
 - 1. Proper question in any capital case: whether the punishment is appropriate in light of the facts and the defendant's background?
 - 2. There are simply too many variables to establish a requirement that a Court must compare each adjudgment against all others to ensure compliance with some amorphous concept of proportionality and equality.
 - 3. More importantly and absent from any discussion of such a requirement, and I didn't hear it this morning, was exactly what remedy we would apply if it were determined that a particular case was disproportionate to other cases, however that may be defined?
 - a. If a defendant is sentenced to death, but it is found on similar facts that other defendants were not, would the Court be required to reverse a death sentence?
 - b. What degree of comparison will be attempted?
 - c. Those questions need to be answered before we head further down the road of data collection and the costs both in time and money that that would entail.
 - 4. Each local DA has discretion to make charging decisions based on the facts of the case, information about the defendants, and knowledge about the local jury pool. It is impossible to establish any equality of charging without undermining that discretion.
 - a. Both Poyner and Ramos made that point this morning.

- b. As Mr. Poyner said, it all boils down to discretion, placed in DAs elected by counties.
5. Does fact that the District Attorney of San Francisco County has made a decision not to seek the death penalty in any case mean that the District Attorney of San Mateo County, Jim Fox, should not be able to charge a death penalty because a crime that was committed on a contiguous border is one that he might be able to charge a death sentence, but the exact crime would never be charged as a death sentence in San Francisco?
- a. I don't think so.
 - b. That kind of discretion is not being used by prosecutors and it's not demonstrating unfairness.
 - c. If some counties are over-charging the death penalty, is it equally fair to say that some counties are under-charging the death penalty?
 - d. The alleged disparities, even if they exist, cannot and do not establish that any particular case resulted in an unfair conviction or the imposition of death.
 - e. Discretion is essential to a fair and humane system of justice (McClesky case). The intangibles surrounding any given criminal case, capital or otherwise, makes attempts to gather charging data and to make statistical comparisons such a doubtful proposition.
 - f. If the crime is one for which death is authorized under State Law and if the facts and circumstances that death is appropriate, then that defendant's sentence is just, fair, and accurate.
6. In terms of transparency that has been discussed as an important part of criminal justice system, that is available in each county to the voters.
- a. If voters of county perceive that DA is misusing or over-charging, they have a remedy at the polls.
 - b. San Francisco residents elected their DA in part because she would not charge the death penalty. It is unlikely that she would get elected as a district attorney in Colusa County. It's equally unlikely that Mr. Poyner could be elected the district attorney of San Francisco.

- c. That doesn't mean that the system is unfair or that differences in policies means that innocent persons will be charged with or convicted of capital crimes and sentenced to death.
 - d. It is the individual cases that matter and no scheme of proportionality review will render the system more or less fair.
7. Position of AG on data collection
- a. AG cannot tell DAs, except under very limited circumstances, to do anything. We could not tell them to turn over any information or to not turn over information.
 - b. DAs do ask about questions raised in surveys from Pepperdine. Those issues are pending in two cases in which we have evidentiary hearings in the Northern District and the Eastern District federal courts.
 - c. Ultimately, each individual DA made his own decision whether to respond to the survey based on the recommendations of the Capital Litigation Committee.

C. Questions:

- i. Hersek: how many deputies in AGs office handle capital cases? With few exceptions, every attorney in the appeals, writs, and trials section of the criminal division (300+) among four offices, handle capital cases.
- ii. Hersek: regarding data collection and charging decisions, if Mr. Ramos is supposed to be held accountable by voters in his district, and yet those voters can get no information, as we couldn't, about how he makes those charging decisions, how are they supposed to, under this system, make that determination as to whether or not the charging decisions are fair or not?
 - 1. Voters know how many capital cases are being charged, whether it's by Mr. Ramos or any other prosecutor. They know how many murder trials are being tried in their county, how many involve special circumstances, and how many of them are ones in which the prosecutor is actually seeking the death penalty.
 - 2. They know what the requirements are because they are a matter of law, under what circumstances death would be appropriate.

3. For the District Attorney to conduct a public hearing on each charging decision simply isn't necessary or appropriate.
 4. If the County has confidence that the prosecutor they elected is going to make decisions based on the discretion he has available to him, the law that's appropriate, the facts of the cases, and the background of the defendants, then they are going to continue to support that prosecutor in elections.
- iii. Hersek: in AG's view, the oversight in the end product, what decision is actually made, is sufficient for the process of making the decision, which is opaque and not transparent?
1. The process is transparent in that the DA has to file the charges publicly.
 2. If there have been 10 murders in 10 years, specials filed in 2 and death sought in 1, then the public has all the information they need. The prosecutor made a decision based on all information he had which cases to seek death in and which special circumstances to file.
- iv. Hersek: Your assertion is that discretion makes the process fairer. Would AG support legislation that would give AG discretion to negotiate these cases when they enter post-conviction process? We've heard statements that the AG has no such discretion at this point. Since discretion is part of the way we make our system fair. Would the AG endorse legislation that gives the AG discretion in that post-conviction process?
1. You're talking about settling cases after trial. Yes, the AG's office has no ability or mechanism by which that could occur, other than a recognition in a particular case that the conviction was unconstitutional and that the defendant did not receive a fair, effective assistance of counsel. In that case, we may not contest. Or if we lost in the District Court, a decision not to seek further review.
 2. It would not be appropriate to negotiate cases at any point at least until after the appellate process in state has run its course.
 3. Whether there should be a mechanism by which the State could consider whether it might be appropriate in a given case, given the age of the case, the facts of the case, the likelihood of success, to find a way of agreeing to accept a lesser sentence on it, that is something that warrants further

consideration and discussion. We would never enter into that lightly.

4. A jury has had the opportunity to hear the evidence after a prosecutor exercised their discretion to charge it. If the jury came to the difficult decision, it will have been affirmed by State Supreme Court and various levels of State habeas, it is a presumptively final and correct judgment. The mere fact that we are in federal court facing additional litigation should not be a reason for us not to defend the judgment. In some older cases or in cases where there has been a development since the trial, we may want to be able to consider taking a lesser sentence with approval of local DA who tried the case.
 5. We don't have the authority and we'd be interested in discussing it further.
- v. JVD: At January hearing, Prof. Radelet reported that in 1990s, those who killed white were 3.7 times more likely than those who killed blacks, and 4.7 times more likely than those who killed Hispanics, to be sentenced to death. Shouldn't that type of data be collected and exposed to DAs in terms of the way they exercise their prosecutorial authority? Shouldn't that data be known?
1. If you collect that kind of data, what would you expect that data to show? When looking at facts of case, race of defendant, victim, witnesses should not have significance, except in a racially-motivated murder.
 2. By looking for statistical information, and it's important to note that to this date there has never been a study that has established that there is a disproportion between the race of the victim and the race of the defendant in California, you're in effect asking prosecutors to pay attention to these factors, age, race, and gender, when they shouldn't be a factor in charging decisions at all.
- vi. JVD: when we asked Radelet why those figures were there, he said they may be present b/c of subtle bias or racism, not saying that prosecutors were intentionally going after defendants because of race. Another possibility he gave was that homicides against white victims were more aggravated than homicides against black and Hispanic victims. On data collection, what should we know about what is going on to better inform everyone about what might be going on, even if it's subtle. The question of better collection of

data, we heard from Pepperdine folks about what would need to go into this. AG's office would be the right place to collect this data. I know as you know that DAs have considerable autonomy. The only time the AG can move in is when law and order breaks down in a particular county. On the other hand, we collect data regularly from arrest through conviction through every course of proceedings to establish what's there, a gigantic data collection mechanism exists. Why couldn't we do this same type of data collection working with counties to have a better sense of what's going on with regards to the death penalty, working with DAs and court people in counties?

1. It may be possible. First, we would need to define what we're looking for.
 - a. Our experience in the cases we have in federal court now is that it's a very broad-based definition of what is a capital case. So you've got definitional problems.
 - b. There are also immense costs in terms of time and money to establish and run the database and extract information.
 - c. 2 cases we are litigating now have information drawn largely from information obtained from probation reports that were in central files in inmates of State prisons, which the CDCR has had to obtain for us, which has proven time consuming and expensive.
 - d. If a recommendation is made about expanding data collection, there has to be money, which presumably should come out of general fund.
 2. To improve process, front-end loading is critical. Adequate funding for defense counsel and investigation would be better spent funds than on data collection that might not prove anything about the overall fairness of the system.
- vii. Judge: when you have the magnitude of disparity that Radelet indicated should be a concern for everyone, defense and AG side. What are the reasons for that? To say it's difficult to do an analysis is not sufficient. A large portion of individuals lack faith in criminal justice system. One of the reasons is because of this disparity. It would be in all of our best interests if we could ascertain if that's just some peculiar statistic that if we had additional information would be explained or is there something else operating? It may be before it gets to the prosecution, the way

people react during investigation, the kinds of people who will come to Court, whom the police have met that would be involved in impact litigation, this is disturbing. We're accountable to public to have a fair criminal justice system.

1. The mere presence of disproportionality does not mean that it's invidious.
 2. Even if we conducted additional studies that have been contemplated and spent the time and money associated with that, what you end up with are numbers that may prove nothing because what you have to look at are individual cases. The case by case evaluation is critical to fairness of system as a whole.
- viii. Judge: the only way we will know this is if additional data is collected on a routine basis so that decision-making is transparent. Otherwise, we end up with a factor of 3-4. There's no explanation of what happened and we're told it would be too difficult to figure out what happened. Then why don't we start by collecting data today so that it will be available to be evaluated? I'm not suggesting that any prosecutors are doing anything, but when each discreet decision results in such an enormous disparity, it indicates to me that something is going on that we are not aware of and we ought to investigate. To say that prosecutors are not bringing death penalty decisions when the victim is a minority is a straw man. That's not even a legitimate kind of discourse here. The Commission ought to address this and use the benefit of your exceptional experience and your perspective as we try to grapple with this.
1. How do you quantify the exercise of discretion? What kind of questions and what kind of data are you going to gather? Is the prosecutor going to be required on each case to fill out a questionnaire to go through each of the things he went through to make the decision to seek death in that case or to file the special circumstances?
 2. There are so many variables in each case that to quantify that in a way that you're going to end up with numbers that are going to be of any true significance or assistance to our true understanding of how the system works strikes me as an exercise in futility, money would be better spent providing funds for defense counsel and investigation.

- ix. Judge: This is an awesome decision to make and I don't see why the discretion should be one in which we just say, "Trust us, we don't take into account any invidious factors." Something is producing these disparities. We should find out what it is. If it verifies that discrimination does not exist, in fact that the nature of special circumstance prosecutions with robbery perhaps has that whites are more likely to be running businesses and killed during robbery murders, I don't know the answer to that and you don't know the answer. Too many people are willing to let the status quo exist—i.e. we don't know. We ought to find out. Otherwise, how do we assure all members of our communities that the death penalty system is fair when we have these unanswered questions that should mandate that we figure out what's going on?
- x. Hing: It's very difficult to quantify discretion, but data that is easy to collect, if it was forthcoming, may lead to many more questions and not answer the questions we are interested in, but rather than leading to a futile end game, it may lead to refining of the questions and to frame them in a more sophisticated way. A lot of what happens in society is unconscious and institutionalized. Is there a willingness of AG to determine settlement in cases with mental retardation claims?
 - 1. If it is established that defendant is mentally retarded at any point in the proceeding, the death penalty is not available.
 - 2. Usually gets sent back to trial court for determination of mental retardation.
 - 3. If the issue were to be raised in a case and we are of opinion that if there is a strong prima facie opinion that mental retardation is demonstrated, and AG's experts were able to make similar determination, then we would settle immediately.
- xi. Craig: even to reduce the number of capital crimes, we would have to go back to the ballot? I thought that the death penalty was established, but that the legislature expanded the list?
 - 1. Yes, Legislature has proposed several expansions of the special circumstances, but they always had to go to electorate for approval.
 - 2. Craig: Example of a meaningless statistic then unless you gather a ton of data and weigh each case individually, you come up with info that means nothing. E.g. since death penalty has been re-instated, 8 people have been executed (6

whites, 1 asian, and 1 african american). That statistic alone would lead to the opposite finding on proportionality. You're three times more likely to be executed if you are Caucasian than if you are a minority. We have to be careful with these statistics.

3. Judge: State of FL found a white guy to execute when they got back into death penalty game. We have to be careful about what statistics mean, but we need to investigate.
 4. Gillette: assertion has been made that Robert Alton Harris was the first person executed in CA simply because he was white. The only reason he was the first person executed was because he was the first person we got through the 9th circuit.
- xii. Uelmen: how many new death judgments are rendered in CA each year?
1. Yes, that's available.
 2. Uelmen: that number has ranged from a low of 12 to a high of over 40, peaking in 1996-1997. Is there an optimum number that system can handle in a year?
 - a. No. The State and AGs office has no business setting that number for the DAs.
 - b. No way to establish that kind of proportionality or numbers game. If it's appropriate, the prosecutor makes that decision.
 3. Uelmen: is there a limit to the number of cases the system can handle?
 - a. Not sure. The system is struggling with the numbers of cases. It impacts AGs office, the CA Courts, and the Federal System, but that doesn't mean we're at a point where we have to say we should stop or get rid of the system.
 - b. The electorate can make that decision. If they decide we don't need the death penalty anymore, fine, let them do that.
 - c. But until that happens, we need to defend the judgments that we have and to defend the constitutionality of those statutes.
 4. Uelmen: numbers are declining in recent years. Do you have any idea why? Is it because juries are reluctant to

return death verdicts, because prosecutors are filing fewer death cases, fewer homicides? What's going on?

- a. Combination of a number of factors.
 - b. Effect of 3 strikes on high risk violent and criminal behavior reducing potential pool of capital murderers.
 - c. Prosecutors may be looking more carefully, not to say that they weren't before.
 - d. Having had several years experience with it, the opportunity to look at the system to decide what cases are appropriate and which are not, we don't know.
5. Uelmen: would it be helpful to know what's going on?
- a. How would you quantify that? I don't know that there's a way to do it.
 - b. Uelmen: for example, if we knew juries are more reluctant to return death verdicts, that might affect how prosecutors make the decisions as to which cases to file?
 - c. I suspect prosecutors take that into account. They know their jury pool and they know the reluctance of juries in a particular type of case to return death. If you have a prosecutor that finds consistently over time that he's seeking death on a certain type of case where the juries will not return death, my suspicion is that the prosecutor will take a long, hard look as to whether he would seek death in similar circumstances.
 - d. Uelmen: Would it be helpful to have some statistical info available to inform that type of judgment available in the system?
 - e. That is a function of the district attorney's knowledge of the county in which he or she has been elected.
- xiii. Totten: We have 600+ defendants on death row. What percentage have had the death judgment returned more than 20 years ago?
1. No, I can't say.
 2. Totten: would you estimate it's a significant number?
 - a. Yes, it's a high number.
 - b. The average time is over 14 years and the last three were 20+ from judgment to execution.
 3. Totten: after death judgment returned at jury level, are there hundreds of separate actions filed at appeals and habeas level?

- a. Yes, you have automatic direct appeal to the Supreme Court unless it's waived (only in 2 cases).
 - b. State Habeas and Federal court review, sometimes multiple rounds. Currently we are seeing §1983 claims and other types of allegations. Ultimately, there is the clemency process as well.
- 4. Totten: it's a fair conclusion that these cases are aggressively litigated on the front and back end through appellate and habeas process?
 - a. Yes, that's correct.
- 5. Totten: Haven't we had some previous experience with defense attorneys litigating capital cases to use in a very aggressive way data collection against sustaining death judgment?
 - a. Much of what they are looking for in proposed study before the Commission is identical to, if not substantially similar to, the types of data we've been asked to collect which is the subject of two evidentiary hearings in Federal Court right now.
- 6. Totten: wasn't there an effort on the race issue in Congress to use racial data to attack death penalty?
 - a. Yes, the McClesky decision said that the numbers of variables are such that you cannot draw any conclusions about the death penalty being racially biased based on that study.
 - b. Racial Justice Act put a racial quota on charging of capital cases, but that was defeated in Congress.
- xiv. Ridolfi: how many cases are decided to be prosecuted as capital cases in each year? We don't collect that information.
- xv. Laurence: you're not suggesting that we not gather data b/c we're afraid of litigation over that data?
 - 1. No, my point was that problems with data gathering have come to the fore in these cases.
 - 2. Purpose of that litigation has been to establish a global, systematic attack on the legitimacy of the death penalty in CA.
 - 3. If data were to establish that, it is what it is assuming you can draw any conclusions from that.
 - 4. I don't think you can draw any conclusions to date that we've seen any significant suggestions from the proposals

either in the cases we are litigating or here that are likely to lead us to useful data or conclusions.

- xvi. Laurence: Cost of collecting data many years later is quite expensive for CDCR. Would it make sense to gather the information going forward so that we're not spending more money down the road?
 - 1. Yes, if you can properly define what you want and establish a reasonable way to collect it.
 - 2. Forward-looking data collecting would be easier to implement rather than retrospective data collection.

VIII. Greg Fisher, Deputy Public Defender; Special Circumstances Case Coordinator, Los Angeles County Public Defender's Office

A. Introductory Comments (best viewed with [his written submission](#))

- i. Criminal defense attorney and deputy public defender for over 33 years working in LA County Public Defenders' Office.
- ii. Tried two capital cases through penalty phase.
- iii. For last 4 years, primarily responsible for oversight of death-eligible special circumstance cases in LA County.

B. Recommendations—three areas in which trial court practices and procedures address focus questions

- i. First, geographical disparities in jury selection process itself.
 - 1. It varies from judge to judge
 - 2. Within LA county, geography can be a good indicator of which system will be used. I'm sure there are disparities outside of LA County.
 - 3. Background on litigation and jury selection for capital cases:
 - a. Trials last substantially longer than average criminal trial
 - b. Capital case involves two trials in one: first guilt phase, then there is a penalty phase with a break in-between phases. Penalty phase involves opening statement, evidence production, final argument, jury instruction, and more deliberations.
 - c. Process takes long time and imposes substantial time hardship on potential jurors.
 - d. Selection process is more complicated—each juror must be asked a series of questions, usually with follow-up, about death penalty attitudes because certain attitudes disqualify jurors from a death penalty case. Each juror is asked questions that probe into

- their personal and moral opinions about the death penalty.
- e. My experience in the trials I have seen is that 75% of jurors brought in to serve on these cases or more are excused b/c of financial hardship. Please see [written submission summarizing testimony](#).
 - f. Because of financial hardship, it takes 800 jurors to be brought to court to end up with 175 who can get through the jury selection process.
 - g. I don't have statistics, but I have observed jury selection in foremost recent capital cases tried by lawyers in my office and heard about other cases. What I've heard is the same in all cases.
 - h. More burden placed on jurors, the fewer we are going to get. The more people are excused for financial hardship, the harder it gets to get a fair cross-section of community in these cases.
4. Two methods used to determine death penalty attitude of jurors in these cases:
- a. Group Voir Dire—all jurors, or as many as can be, maybe 100, are brought into courtroom. Each juror answers questions about death penalty attitudes in presence of all other jurors. Before that starts, all jurors are brought in to go through hardship process on day one. Most are excused at that point. The ones who remain will fill out questionnaire. Then they go through death qualification process, of finding out about their attitudes about the death penalty which might disqualify them from the death jury. In group method, each juror appears day after day until process is completed. Then each juror comes back for final day of selection in which peremptory challenges and jury selection.
 - b. Individual/Sequestered system—starts out in same way: all jurors are brought in. Hardship determination, questionnaire is filled out. Each juror is designated to come back on a certain day with a small group of jurors until all have been considered. In that system, each juror only comes in for a half day and is otherwise free to go about their work. Jurors

only devote one day or half day to initial screening and another half-day to be qualified in terms of attitudes, and then the final day.

5. Two significant differences between systems, which are both negative when you compare the two.
 - a. In the group system, there is a much greater time burden placed on jurors—coming in morning and afternoon while other jurors are questioned about death penalty attitudes. It puts a greater burden on people.
 - b. When jurors are asked personal questions about feelings, opinions, and prejudices in front of a large group of people, there tends to be a process of social inhibition that makes people reluctant to answer those questions in the group process. At the same time, when Jurors hear other people answering these questions, they quickly learn the socially acceptable answers, the unacceptable answers, and they figure this out from the reactions of the judges and lawyers. Those who want to appear socially acceptable, they gravitate to give those types of answers. Jurors who want an excuse to go home will quickly learn what to say to get excused.
 - c. Either way, the environment of questioning is not conducive to understanding the true attitudes of jurors. It's more conducive to concealing them.
 - d. In individual setting, once small groups are determined, jurors are interviewed individually by judges and lawyers. Jurors are generally more candid with their views. That's beneficial to both prosecution and defense.
 - e. I suggest the Commission should take a look at this.
6. JVD: have you taken this up with the CA Judges' Association or with the AOC or the CPDA?
 - a. No.
 - b. JVD: your conclusions about the totality of time jurors spend in court seems a no-brainer. If someone just understood those numbers and got the word out...
 - c. There may not be enough information out there. Cultures develop. Judges don't see a lot of these

cases. If the expectation is that we will save time this way, then that's is what is done.

- d. Geography can be a good predictor of how this happens. Also, in modern age, the way we select jurors, the individual sequestration method does not need to take longer.
7. Uelmen: how much longer does it take to select a jury for a death case vs. non-death case?
 - a. Avg. criminal case—jury may be selected in 1-2 days
 - b. In 4 death cases I viewed, it took 8-10 days in each case. Death cases do take longer.
 - c. It doesn't take any longer for the group voir dire vs. individual/sequestration method. But other costs are incurred when you use the group method.
 - d. You get much more truthful and honest answers in the individual sequestration than in the group method.
8. JVD: appointed lawyers can only request second counsel after DA has made decision to seek death?
 - a. Yes. In Public Defender's Office, what happens when you have a special circumstances case where there is death-eligibility and the decision has not been made, do you have two counsel appointed immediately?
 - b. We don't have this kind of limitation. We can and do assign two attorneys at the outset. We don't assign two at the outset of every specials/death-eligible case.
- ii. Taxing of Resources
 1. ABA standards indicate that two lawyers should be involved on every death case.
 2. Problem is that b/c of broad scope of death-eligible cases in CA, we are required, at any given time with 60 death-eligible cases at any given time, we know statistically that no more than 10-12 of them will be tried as death cases.
 3. The problem is that we don't know exactly which ones and we cannot predict which ones will be tried in that way.
 4. The problem is that we are ethically obligated to prepare each death-eligible case as if it would be tried as a death case. We're not ethically permitted to rule out a case by looking at it and saying that it's at such a low level for these kinds of cases to treat it as not a death penalty case.

5. This requires us to do what needs to be done in every case—undertaking mitigation investigation. Defense counsel is required to do it at an early stage concurrent with the guilt phase.
6. That means investigating life history of client, putting together a comprehensive, multi-generational social history, and according to mandate of Supreme Court in cases such as Wiggins and Ronpilla, we are mandated to find every fact in mitigation that might be out there. It's a tall task to find every mitigating factor out there.
7. You have to devote numerous resources and assign two attorneys, not only for the reasons Mr. Philipsborn mentioned earlier but also because these are very complicated cases in terms of mitigation factors, experts needed, forensic issues, etc. Prosecutors take these cases very aggressively. They will make issues of things in these cases that would not be issues in other cases and so do we.
8. JVD: some of the work you do at this level will be turned over to DA and cause the DA not to seek death penalty?
 - a. Yes, we need to investigate the guilt and mitigation phase early on to give input to DA at time they make decision.
 - b. Problem is that investment of time, effort, and resources on 48 cases is wasted b/c ultimately we only will have 10-12 that will be death cases.
 - c. The reason is that the CA death penalty statute is too broad. Our law has made it this way.
 - d. We can't blame DA for filing a special circumstance if it applies, but there are all these cases coming into the system and who are we to say if it applies.
9. Recommend to Commission that narrowing the volume of cases that are death-eligible is the most obvious solution to this problem, whether you eliminate felony-murder or something else. These are political questions.
 - a. We have a system where the Legislature is supposed to do the narrowing, but instead, prosecutors do the narrowing. I don't doubt that prosecutors have sleepless nights and exercise their discretion, but is that how the system is supposed to work?

- b. If decisions are made on front end, if the decision is made 1-2 years after filing, a lot of time is spent by defense counsel doing multiple stages of investigation in the event that the case is a death case.
 - c. If the statute is not narrowed, there may be other reforms that could be implemented to preserve these resources. For example, don't see why DA in LA county or other large counties can't make decision at initial filing that it will be a special circumstance murder, but based on other information, we won't seek death penalty.
 - d. This is not something prosecutors don't do in other contexts, e.g. filing "wobblers" as misdemeanors or felonies.
 - e. Based on current information, it seems we could cut some of these cases out of the system on initial review.
- iii. Another reform would be that defense could request an expedited review from DA
- 1. In LA county, DA does not make decision on whether to seek death until after the preliminary hearing.
 - 2. A penalty evaluation memo is prepared after the preliminary hearing. Once that is completed, it's calendared for a hearing in front of the committee. The defense is given notice and input is solicited.
 - 3. Although procedure calls for it to happen soon after preliminary hearing, in practice it sometimes happens far down the line.
 - 4. JVD: do you agree that after the preliminary hearing is the appropriate time to make final decision?
 - a. Yes, in a case that's a close case, it is. When I speak of expedited review, I'm speaking of a case where the defense attorney looks at it, maybe it was filed 30-60 days ago but we're well in advance of preliminary hearing, the defense attorney says that this isn't the type of case that they would seek the death penalty on if I'm seeing everything there is.
 - b. They don't seek the death penalty where the defendant is an 18 year old gang member with a history of mental problems who killed a rival gang

member. It's not the type of case that they would seek death.

5. JVD: Can't you ask for that now?
 - a. Currently, there is no procedure for the defense counsel to make that request in Los Angeles County.
 - b. Don't know of any procedure or process where Chair of committee will make a decision before it goes through their process. If there were such a process, an expedited review would be sufficient. There wouldn't have to be a lot of meetings.
 - c. JVD: question for DAs is if there is enough information at that point to do it. They may say that we'll look at it, but we need to know more.

C. Questions:

- i. Judge: Just to clarify what you're saying, you're not talking about the kinds of cases where the DA would benefit from hearing about the defendant's background per se, although that might occur if they decide that they're not on an expedited basis going to forgo death, you're talking about in the four corners of police reports, pleadings, and prior record, that it really doesn't look like the type of case where they have been seeking death and maybe if that's an internal proportionality review that they could do, if that was done early, that would prevent the expenditure of a lot of time and resources.
 1. DAs office puts much greater weight on circumstances of crime than on mitigating circumstances of defendant.
 2. Reason we run into inertia on working this out locally, it's usually defense putting in more resources than prosecution. The police agencies have investigated and filed case. Now they are done.
 3. The DA now needs to put together enough for a preliminary hearing. They're not close enough to trial that they need to do much with the case. So there's not much motivation for them to work up the case too far.
 4. Reform encouraging them to do this would be helpful.
- ii. Judge: you see this as a statewide issue?
 1. This is a statewide issue.
 2. It's a bigger issue in the large counties. In LA County, we don't have a problem with the DA getting input from us.

They want input from us. They usually give us more time if we need it, to get them information.

IX. Michael Laurence, Director, California Habeas Corpus Resource Center (HCRC)

A. Introductory Comments

i. How did I get to HCRC

1. Clerked for John Van de Kamp in AG's office in Bureau of Criminal Statistics.
2. My perspective on death penalty was informed by that experience.
3. Then became a defense attorney, have been doing exclusively capital work since 1987.
4. Now an administrator in an agency that represents death row inmates.
5. Those are three different perspectives that come to bear when considering whether California's post-conviction process needs to be changed.

ii. Does CA's system for post-conviction review need to be changed?

Yes. Chief described our death penalty system as a whole as dysfunctional. I endorse that description. The post-conviction proceedings in California are catastrophic. Capital representation is catastrophic in post-conviction for four reasons:

1. Alarming number of cases in California without post-conviction representation.
 - a. Half of people on death row don't have state habeas lawyer.
 - b. That's 284 people.
2. Critical consequences that attach to when we find lawyers in post-conviction proceedings is becoming even more critical.
 - a. We are not finding people to represent individuals when we appoint people in the direct appeal.
 - b. When someone is sentenced to death, the first person they get is a direct appeal lawyer.
 - c. They don't get a post-conviction lawyer till many years later.
 - d. The case proceeds through state appellate process at a quick pace before lawyers for post-conviction are assigned.
3. Systemic failure to correct error in State Court proceeding process.

- a. CA Supreme Court affirms cases at over a 90% rate
 - b. There reversal rate for post-conviction proceedings is even less, i.e. more than 95% of cases that CA Supreme Court has heard in post-conviction proceedings have had habeas relief denied.
 - c. We're not in a system like other states where the highest court fixes error at the lower court level.
 - 4. Inability to stem flow of cases into the system, primarily the result of an overly broad statute.
- B. Why we don't have counsel
 - i. CA Supreme Court has done a good job at finding lawyers for automatic appeal process.
 - 1. At one point, we had 150 cases in California in late 1990s w/o direct appeal counsel.
 - 2. That number of people without appellate counsel is now in the 70s. The backlog was cut in half.
 - 3. They are now quickly finding direct appeal counsel.
 - ii. The exact opposite is true in habeas appeals
 - 1. There are 284 people on death row without habeas counsel assigned. 208 of those have direct appeal counsel, but don't have habeas counsel.
 - a. 10 of our cases at HCRC have been set for oral argument in the CA Supreme Court on direct appeal.
 - b. Or in some cases they have already been affirmed on direct appeal (3 cases). That means a case is affirmed by CA Supreme Court but there is no assigned habeas counsel.
 - 2. Why can't we find habeas counsel?
 - a. Money drives the system.
 - b. Few people can afford to take post-conviction cases and do so successfully.
 - c. I was in private practice after 10 years of capital litigation; we could not afford to do this at the State level even knowing all the case law.
 - iii. The fees we pay post-conviction counsel represent a fraction of the amount of time that lawyers spend on these cases. And more importantly, the amount of money available for expenses—experts and investigation that needs to be conducted—is a fraction of what needs to be spent.

1. Has been increased from \$25,000 to \$50,000, regardless of whether the case has a large record or a small record.
2. \$50,000 is the maximum you can get for investigating, developing, and presenting a post-conviction petition to the Supreme Court.
3. Compare this to the trial level, where you have access to §987.9 funds and you're able to ask for additional funds as needed.
4. Looked at many records where LWOP has been imposed. It's a common experience for people to spend several hundred thousand dollars to investigate those kinds of cases.
5. If you don't get the money at the trial level, you don't get the money at the post-conviction level either.
6. 3 of the 13 that Dane Gillette mentioned were executed were my clients.
7. The single characteristic that I can discern from the cases that end up in LWOP and those that end up in death verdicts is the amount of money spent on investigation at the trial court level.
8. I can point to dozens of cases in my office alone where less than \$20,000 was spent at the trial court level to investigate the case.
9. That is the most inefficient process we have at CA.
10. In sum, the cases that end up in death are by and large the cases that were not fully investigated at trial level. Money not available at post-conviction level. There is no error correction at State Court level. Cases go into federal court and federal court finally funds the investigation that needed to be funded at the trial court level.
 - a. That is 15 years after judgment
 - b. That is the most inefficient way to be looking at these cases.
11. What happens in Federal Court? You present new claims.
 - a. If it wasn't spent at the state post conviction level and was not presented to the California Supreme Court, those kinds of issues have to be presented to the CA Supreme Court.
 - b. After state process is done, access to money is no available to people representing death row inmates. They develop new claims and what happens? They

2. If you've been affirmed on direct appeal in State Supreme Court, the clock is running on your federal habeas rights.
3. In Alabama in 1997, they had 30 cases where statute of limitations had been blown because nobody had filed a state petition in Alabama, a state which does not have a right to counsel in post-conviction proceedings. 30 people sentenced to death did not have a federal remedy.
4. CA, which has a right to counsel, is in very same position unless we provide counsel at this critical post-conviction stage

D. Failure to correct error

- i. CA Supreme Court affirmance rate at 90% is highest in the country (from Howard Mintz study at San Jose Mercury news)
- ii. TX Court of Criminal Appeals, AZ Supreme Court, FL Supreme Court reverse 30-60% of cases on direct appeals or in post-conviction proceedings.
 1. Does that mean we don't have errors in CA?
 2. Yes, we do. We just did a study in which the District Courts and the 9th Circuit Court of Appeals have granted relief in CA capital cases, on the merits so that there's a final decision reviewed by SCOTUS if cert was sought and a determination that the person deserved a new trial, 61% of cases decided since 1978 have ended up in reversal on merits.
 3. Even if you think 9th circuit is aberrant and SCOTUS doesn't fix the 9th circuit's excesses, 61% of cases will come back to the State court system.
 4. Either we fix them in the State court system or we deal with the cost and the inequity of dealing with them many years after trial.

E. 9th Circuit aberrant?

- i. AZ Sup. Ct. reversed 40% on direct appeal or post-conviction.
- ii. If you look at the reversal rate comparing the Federal Courts reversing CA courts, it's happening at the same rate
- iii. This means that error correction is happening at the federal level as well.

F. Narrowing statute

- i. In 1980s, we had info on special circumstances filed every year was that approximately 300 special circumstances were filed between 1985-1986 by prosecutors around the state.

- ii. Of those 300 cases, we had 18 death sentences imposed in 1985 and 26 in 1986.
- iii. That is 5-10% success rate of filing special circumstances. Not all those cases went to trial as capital cases.
- iv. We are having to fund inequity into the system—investigate and pour resources in to the system at trial level when a small fraction of cases will end up in death sentence.
- v. Part of the problem is that we haven't given enough direction in statute as to whether prosecutors should or shouldn't charge as capital cases.
- vi. Couple that with the Shatz study which said that 85% of 1st degree murder cases could be filed as capital cases, we're looking at a large drain on resources at the trial level
- vii. People are being sentenced to death b/c we don't have enough resources at the trial level, not because these cases are more worthy of death than others, but we cannot possibly provide counsel to the 600-900 special circumstances cases that were pending in the mid 1980s

F. Recommendations

- a. If we are going to have a capital punishment process, we have to fund a capital punishment process.
- b. In post-conviction, that will require a massive infusion in order to provide counsel.
- c. We need to come up with a system of error correction before these cases go to Federal Court. If we don't, the Federal Court will continue to reverse a number of these cases many years after the sentence.
- d. We need to find a way to provide more guidance to prosecutors. My suggestion is that of our speakers in January: narrow the statute to appropriate special circumstances.

X. Michael Hersek, California State Public Defender (OSPD)

A. Introductory Comments

- i. My agency handles direct appeals to CA Supreme Court.
- ii. Office created in 1976 to represent indigent criminal defendants of all stripes, from regular felons to capital cases.
- iii. In early 1990s under a gubernatorial directive, Office of State Public Defender was asked to focus on capital cases only
- iv. OSPD took dual appointments
 - 1. Dual appointments are when we took the appeal and habeas simultaneously.

2. As the Chief Justice mentioned, that system ground to a halt with over 170 people awaiting counsel in the 90s.
 3. That was appointment of appellate counsel and habeas counsel.
 4. In 1997, three branches of gov't created two agencies to address backlog—HCRC for habeas and OSPD for direct appeals. At that time, OSPD was expanded to 128 funded positions.
- v. Private post-conviction and appellate bar always was intended and will remain a necessary component of the capital defense process—always contemplated that cases that OSPD could not take could be picked up by private bar (as well as habeas cases).
 - vi. Within three years of 1998, budget cuts started.
 1. By 2003, OPD had 120 death penalty appeals and we lost 41 positions, more than half of which were attorneys.
 2. OSPD today represents 132 men on death row.
 3. We have 10 habeas cases from before HCRC, pre-1998.
 - vii. Two agency model has been cut dramatically.
 1. We're still making progress, notwithstanding cuts.
 2. We have 80 men awaiting appellate counsel on death row at San Quentin.
 3. A large part of that responsibility, for cutting the number of represented on appeal, is b/c OSPD has stepped up and taken 132 cases on appeal.
 - viii. Regarding next year's budget, OSPD will be cut again, facing a 10% cut.
 1. We've already given back 10% pro-rated; we gave back to the State \$405,000.
 2. We're looking at about a \$1.2 million cut for next year.
 3. Our whole budget is \$12 million per year.
 - a. 95% goes to fixed costs and salaries.
 - b. When we endure a \$1.2 million cut and have to give back \$405,000, we will lose attorney positions with this cut.
 4. That will cut into our ability to keep reducing the backlog in cases for men and women awaiting counsel on appeal.
 - ix. Even though we've taken strides in reducing backlog, there's still a 4-5 year wait from time that defendant is sentenced to death and the time he receives appellate counsel.
 - x. This is the context for what my agency does.

B. Focus Questions

i. Question 2

1. #1 problem facing Californians is in post-conviction process is insufficient counsel to take these cases.
 - a. Fix from 10 years ago has been de-funded.
 - b. Along with HCRC receiving hundreds of applications for one position, we also receive extraordinary interest in positions when they become available.
 - i. I have 150 applications from lawyers wanting to make a career doing death penalty defense within the agency setting.
 - ii. One hears that it is the criminal defense bar that wants to grind the system to a halt. That's not my experience.
 - iii. My experience is that there are a lot of people willing and wanting to do this work in a setting that is supportive emotionally and financially. That tends to be in the agency setting; not to diminish those who do it in private practice. Having a stable environment in which to practice and learn really promotes one's ability.
 - iv. We have four attorneys in last years that have matriculated from just out of bar to qualified to assist on capital cases.
 - v. Growing young talent is very important.
2. What impact Chief's proposal will have on problem of appointment of counsel?
 - a. Our concern is that Chief's proposal focuses on Court's internal backlog.
 - b. Chief acknowledges that we need a systemic, comprehensive approach to dealing with internal backlog at court as well as backlog of men and women waiting appointment of appellate and habeas counsel.
 - c. Our concern is that transfer of cases to appellate courts will add a layer of litigation to every capital case
 - i. In 132 cases that my office has, we will now have to do our normal litigation plus petition for review identifying how court of appeal

- erred in their decision-making, how they got facts wrong.
 - ii. It's going to be another layer of litigation at the appellate stage. That may not sound too complicated. But when you multiply that over 132 cases and diminishing staff at the agency, it becomes overwhelming.
 - d. The way we'll function is that we won't be able to accept as many appointments in the first place. The progress we've made in reducing backlog from 170 cases in 1990s to 80 cases now will be reversed.
 - e. Chief included that agencies need to be revitalized
- 3. Any proposal aimed at addressing the problems with the post-conviction system needs to address the following:
 - a. Return OSPD to 1998 level of funding and staffing to deal with the problem that agency was modified to deal with.
 - i. Helpful in addressing issue of finding habeas counsel, that OSPD's mission be modified to include dual appointments where HCRC has a conflict, e.g. co-defendant cases.
 - ii. Many lawyers at OSPD have extensive habeas experience.
 - iii. Their expertise in habeas is going untapped.
 - b. Dramatic staff increase in HCRC
 - c. Pay parity with Federal bar handling same work
 - i. The federal attorneys doing same work make one-third more per hour than our state attorneys
 - ii. We're trying to attract qualified people to do these state cases and they're making more money and relief in Federal system.
 - d. Increase funding for private counsel handling state cases. The funding for expenses, the \$50,000 is not enough
 - e. Modify state habeas procedures along lines mentioned by Dane Gillette to streamline pleading requirements in habeas and have more fact development in Superior Court in State Habeas. One big step is having AG file real formal answer with evidentiary support so that

parties can know contested issues earlier in proceedings rather than general informal denials.

ii. Question 4

1. Yes to each of the sub-questions
2. Felony-murder special circumstance needs modification.
3. Two-tiered special circumstance approach following Judge Kogan's suggestions in January
 - a. Current specials would require LWOP if found true
 - b. Selection of a few specials would then make one death eligible

C. On behalf of 132 people we represent, we ask that the Commission seriously consider whether this Commission can tinker sufficiently with the mechanism of death to make it more fair. If we decide that we can't, that there's no way we can actually make recommendations that would fix the system, then we should each consider, individually, what recommendation we make to the Senate as to whether we should just say no to our death penalty system.

XI. Michael Millman, Director, California Appellate Project (CAP), San Francisco

A. Intro

- i. For past 25 years, CAP has been assisting private counsel who take on the appointments in death judgment cases
- ii. Established by State Bar at recommendation of CA Supreme Court.
- iii. Drafting behind Laurence and Hersek and Chief Justice's comments
- iv. Large systemic problem is not going away, not amenable to simple fix; we need more data to know what it takes to do these cases right, pursuant to ABA guidelines.
- v. We have benchmarks that were established 20 years ago for habeas cases, before ABA guidelines, Wiggins, etc. What does it take to do a habeas case now?
 1. It takes more than 400-500 hours in Court's benchmarks.
 2. There's been talks about incremental changes to those benchmarks. The Court was open to modest change. In fact, there hasn't been change.
 3. Most people would estimate 1500-3000 attorney hours to do habeas petition properly.
 4. It's not simply a question of the hourly rate, but a question about how many hours will you be paid for. If you will be

paid for half or less than the hours you put in, your hourly rate is significantly decreased.

B. Recommendations

i. Expenses

1. Is \$50,000 something we should be satisfied with? Depends on what it takes to hire experts and investigate capital case.
2. If the number were \$35-40,000, then an increase from \$25-50,000 would be a significant remuneration.
3. If the cost is really \$200,000-300,000, then the recent increase cannot be expected to make a significant dent in backlog.
4. We need data to know appropriate funding level

ii. Problems on front end—denial of §987.9 funding

1. It's not really §987.9 funding as it was characterized in 1977 when the death penalty came back.
2. The understanding was that it would be funded adequately by the State of California so that accused would have adequate representation. That was the quid pro quo of the death penalty. That funding has not existed for well over a decade.
3. Now, people are relying on whatever the County budget can afford for §987.9 funding as opposed to what the State can afford. That presents a problem on the front end.

iii. Increase funding for HCRC and OPD

1. Doesn't make sense systemically to cut those offices which are efficient deliverers of services.
2. But we should also fund private counsel and CAP that can assist private counsel and make it feasible for more private attorneys to take these cases.

iv. We are shifting costs further down the system so that cases that were not adequately prepared at trial are being prepared post-conviction, which is not efficient.

1. Cases not prepared at State level are being prepared at Federal Courts, who don't appreciate the fact that they're funding what should be done at the State level.
2. And then cases are being remanded. Then prosecutors say "why didn't you do this in State Court?" And we say that we didn't have funding then.

- v. On funding, in these discussions, as we look for culprits, defense attorneys have been inappropriately criticized in some circles and blamed for systemic failures to which they are responding.
 - 1. A sole practitioner cannot bear risks associated with capital litigation.
 - 2. Agencies are better equipped to absorb it.
 - 3. If you're on your own, and you're cut significantly or deferred significantly, that's a financial risk most can't handle.
- vi. Inflexibility regarding funding and procedural matters
 - 1. \$50,000 is a one size that fits all.
 - 2. If an OSC (order to show cause) is issued, no matter what your case, no matter how many homicides, no matter where the case emanated from in terms of geography, you get the same \$50,000. No trial court would function on a one-size-fits-all basis.
 - 3. We have a system in which counsel have fee requests deferred for substantial periods of time, for understandable reasons from Court's perspective, but not from counsel's perspective.
 - a. E.g. you file an opening brief with overage of hours above benchmarks.
 - b. When will court decide that you get overage? Not until Court has benefit of respondent's brief and appellant's reply brief.
 - c. So then the chambers can look at the case and assess whether the hours on opening brief were appropriate.
 - d. That may work for Court, but that doesn't work for counsel who has 600-900 hours, over \$100,000 of fees that may be deferred for three years.
 - 4. Evidentiary hearing fees have been deferred for many months.
 - 5. Inherent difficulty of having appellate courts do what trial courts ought to do
 - 6. No formal ombudsperson to explain to court why greater cost is necessary, why it took longer than benchmarks provide.
- vii. Procedural matters
 - 1. In California, we have a presumptive time of the state.

2. It's the time by which you are supposed to file habeas petition.
3. It was never conceived of as a deadline, but as an encouragement to file sooner and a safe harbor.
4. It's turned out to have much more serious consequences
 - a. If you don't file within that period, even if your petition is ultimately timely, you don't get the increase from \$25,000-50,000.
 - b. If you don't file within the time of state, you will be precluded from federal review.
5. As a sole practitioner, if you have a crisis in life such as trial that you didn't expect, if you explain that to CA Supreme Court on opening brief, they will extend you
 - a. If you say the same thing on habeas petition, they don't get extensions on presumptive time of state.
 - b. That's a very difficult scheduling risk for private counsel b/c there are no back-up agencies to cover for them.
 - c. Focus on timeliness is derivative from AEDPA (Anti-terrorism and Effective Death Penalty Act) statute of 1996.
 - i. It's a one year statute of limitations for filing in federal system.
 - ii. It doesn't work where there is no habeas counsel in place to toll statute.
6. OSPD could do habeas corpus in some of their cases. That would diminish some of the concerns.

C. Perspective

- i. Two sides of the issue? Prefer not to think of it in terms of two sides—for or against the death penalty.
- ii. It should be a question of whether we can do better in running this system than we are doing now. Answer has to be yes. Chief said system is not working. That's right. Hard choices have to be made.
- iii. Do we fix this system or do we put our resources elsewhere? It seems myopic to go on under the current system

D. Questions

- i. Uelmen: according to the Chief Justice, if CA chooses to have a functional death penalty, then it must devote sufficient resources to this endeavor. We've learned this morning that we can't tell the

people of CA what this will cost; there's no way to estimate how much resources it's going to take to fix the problem. Is that right?

1. Yes, we've been told, but I don't accept that.
 2. If we think the allowance for doing habeas representation is inadequate, then we need to find out what it takes to do it right, then we set that as the standard.
 3. If we follow ABA guidelines by putting two attorneys on cases, doing a comprehensive Wiggins, etc., investigation, you get a range of hours and multiply by an hourly rate to determine what needs to be spent compared to what we are spending now.
 4. It seems to me eminently do-able.
- ii. Uelmen: take post-conviction and appeals, would you agree that through resources of CAP and HCRC and OSPD, the cases we are handling now are being handled competently?
1. Across the board, no. Some are handled much better than others.
 2. Conventional wisdom is that if you are picking lawyer to do habeas work, you pick HCRC.
- iii. Uelmen: if we did pick the HCRC to do the 212 cases now that don't have habeas lawyers, how much would it cost?
1. Don't know. It would be a substantial amount of money.
 2. No indication that CA is ready to make that investment
 3. It would take time to hire and train additional staff to do that.
 4. Surely we can do projections that would tell people what it would cost. Doesn't seem that mysterious to me.
- iv. Chaleff: If we hired the numbers of lawyers we need, etc, do we have a Court system that can handle all those cases, enough judicial resources?
1. I don't know.
 2. We have to address the counsel issue and the funding problem as part of any effort to change whole system. I don't understand the change without addressing those.
- v. Judge: what would you project the affirmance rate to be in death cases in comparison if appellate courts were handling these cases?
1. I don't know.
 2. No useful speculation
 3. I'd like to think it would be somewhat lower.

- XII. Barry Melton, Public Defender, Yolo County; California Public Defenders' Association (CPDA)—best viewed with [his written submission](#); see also the [CPDA letter to Chief Justice George on his proposal](#)
- A. Intro Comments
- i. Representing CPDA which has a membership of over 4,000 trial lawyers, equal or greater number in private practice throughout the State.
 - ii. Many are public defenders but many are private attorneys.
- B. Echo comments
- i. §987.9 funding—there is no such thing as this penal code section. It has language about state funding, but there is no money and it hasn't been funded for many years.
 - ii. We are a general fund operation. We're the biggest single draw on county funding b/c we have no auxiliary funding. Most of the other county agencies have funding from grants and other sources.
- C. Another statute—Gov't Code §15200 et seq.
- i. Statute says that State will help counties in prosecution of homicide cases, funding based on formula around percentage of property taxes.
 - ii. This year, local assessors are re-assessing record number of properties in counties downward b/c prices dropped precipitously.
 - iii. Even if State found funds to cover this statute, it really doesn't. Provisions of the Gov't Code says they will fund homicide cases, but as a practical matter we don't the funding.
 - iv. This funding scheme puts legal decisions in the hands of the State Controller. Travel decisions of over 1,000 miles roundtrip must be approved by AG's office. Would I have to explain to AG's office during a trial why I need to travel over 1,000 miles and that I need to do so?
 - v. Please take a look at this statute b/c there is something wrong with the language.
- D. Trial Level
- i. We're not making it at the trial level. Millman talked about how much would it cost to do Wiggins analysis and so forth.
 - ii. ABA guidelines are 130 pages long. First 122 pages discuss what should be done at trial and last 8 pages discuss what should be done at post-conviction level.
 - iii. Our requirements are phenomenally detailed and restrictive.

- iv. If we had money to follow ABA guidelines at trial level, then maybe they wouldn't need all the money they're talking about at post-conviction level.
- v. We're not adequately funded at the trial level.
- vi. We know that if we have resources we need at trial level, to visit within 24 hours of case being charged, immediately beginning mitigation investigation upon accepting the case, we could settle more of these cases and get facts before DAs that they need. We could stop a lot of the problems at the beginning.
- vii. Don't address end point of system when we need to discuss where the problem starts. Trial level is where it really counts. We have these cases for years.
- viii. For a few weeks, I was the County Administrator of my county, so I understand the fiscal issues facing counties.
- ix. I've also worked in the OSPD. The work starts in the trial court.
- x. Discussion of Chief Justice and Commission about post-conviction review is too late. Don't have back-end of discussion first.
- xi. If you want to fix death penalty system in CA, begin discussion where it begins—defense attorneys in trial courts.
- xii. When I was at State Public Defender's office, I had a guy who had been on death row for 25 years when I became his counsel on re-trial.
- xiii. To take any part of the system in isolation is a mistake.

E. Questions

- i. JVD: DAs say they don't see any problems at the front end?
 - 1. One of the resource problems we have on the county level is that DAs receive extraordinary number of grant funds.
 - a. Our county looks at us on the percentage of general funds we take.
 - b. County DA's offices are 30-40% funded.
 - 2. We're entirely a general fund operation.
- ii. JVD: they do things you don't do and vice versa.
 - 1. We each have our end of the system.
 - 2. I do LPS probate cases which they don't do.
- iii. Hersek: what recommendation would make to us regarding additional funds at the county level? We've gone back and forth about a recommendation for oversight at state level of public defenders that might help public defenders put pressure on their counties to better fund them. As far as how to get your operation the necessary funds to do these cases right in the first place.

1. It begins with re-funding §987.9 and taking away the Gov't Code ridiculous restrictions in §15200 et seq.
 2. It's an exercise in frustration.
 3. It's like collecting on insurance you've bought when it's impossible to collect.
- iv. Craig: what about Question #5? Don't we address those issues there?
1. Why is Chief talking about back end of the system instead of front end?
 2. Chief discussed lack of judicial resources in our counties as well.
 3. Future judge positions we were supposed to get are not coming. They're slowing down replacing the judges who recently left.
 4. Yolo County, a median county, 23rd largest county in State, has one of the lowest property tax formulas in State b/c we were dealt out when Prop 13 passed.
- v. Uelmen: review the bidding as to how §987.9 was de-funded? The original understanding was that the State would pick up the costs and the counties would not have to.
1. I don't know. I remember submitting my §987.9 bills in Mendocino County. I dealt with County auditors office. They would say, "we haven't seen the money." After 2-3 years, the money would still not be reimbursed.
 2. By the time I got to Yolo, they said don't bother tracking, it's never coming.
 3. Let's not talk about §987.9 and Gov't Code §15200 as if they exist.
 4. If you look at Gov't Code legislative history, every once in awhile they'll name a new county where a high-profile case is happening, e.g. Merced with the Scott Peterson case. They'll tamper with it slightly to give it to one county that is really getting slammed.
 5. Hidden message is that other counties will not get it unless the legislative history names the county. The 4-5 amendments in the last 10 years have been to help the counties that get high profile cases.

XIII. Prof. Elisabeth Semel, Director of Death Penalty Clinic, Boalt Hall School of Law

A. Intro comments

- i. Began career as a Deputy Public Defender in San Diego in 1975 and then after several years became a community defender in Solano county; went into private practice in 1980 in San Diego until 1997.
- ii. In 1997, I became death penalty representation director for ABA in Washington D.C. I was there for 4 years.
- iii. I then went to Boalt Hall to direct death penalty clinic.
- iv. In course of my career, I've handled every case with a focus on crimes of violence, including capital cases, at state, federal, trial, and post-conviction levels.

B. Recommendations

- i. I've been asked to address questions within the framework of the ABA guidelines
 - 1. While I was director of the Death Penalty Representation Project, I relied on guidelines on numerous occasions.
 - 2. I was involved in revision of guidelines which took place between 2000-2003.
 - 3. "Qualified lawyers" as it is used in focus questions, I do that with understanding that qualified lawyers who have the necessary skill, training, and resources to represent their clients, the kind of resources, whether they are investigative or experts, that the guidelines mandate.
- ii. ABA guidelines were not adopted for benefit of lawyers—adopted so that men and women who were eligible for capital punishment receive "high quality representation." They mandate what counsel must do to defend their lawyers:
 - 1. Two lawyers
 - 2. investigators
 - 3. mitigation specialists
- iii. All this is based on needs of defending a capital case.
- iv. From empirical perspective, it is difficult to determine degree to which CA complies or does not comply with requirements of ABA guidelines
 - 1. Info available says that most clients do not receive, at trial or post-conviction, the quality of representation.
 - 2. Capital representation must satisfy the guidelines.
 - a. Compliance cannot be accomplished w/o an overhaul of County based trial-level system
 - b. Overhaul of habeas stage that would end the gross disparities between lawyers who take these cases as

private counsel and those who do so within confines of state agency.

- v. ACLU of Northern California sent out record requests last year analogous to FOIA requests to Superior Courts of CA
 1. They sought written information that would describe appointment of counsel in death eligible cases, minimum standards for lawyers, examples of contracts that are utilized.
 2. 42 courts responded that they had no written information.
 3. This request was made 4 years after CA Rule of Court 4.117—this rule set minimum standards for appointment of counsel in death penalty cases.
 4. Judicial Council promulgated two forms—Form 190 and 191
 - a. Trial court, when it appoints counsel, must prepare an order certifying that lawyer meets requirements of 4.117, and
 - b. Lawyer must fill out certification that they meet this requirement
 - c. That 42 courts said they had no written info was disturbing, to say the least.
 5. Follow-up by ACLU with inquiries to public defender and alternate public defender offices asking for more information.
 - a. It got nothing from Riverside County. While Riverside has 5.3% of population of CA, it has accounted for 14.6% of death sentences since 2000.
 - b. While some county administrators made passing reference to 4.117, fewer than 3 referenced ABA guidelines at all.
 - c. To the extent that public defender's offices responded, they responded that we have no written procedures. We exercise our discretion in selecting counsel who are best qualified to handle cases and do so on a case-by-case basis.
 - d. Of greater concern, flat fee, low-bid contracts, which are specifically prohibited by the guidelines, are becoming the norm for the appointment of counsel at the county level: Fresno, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, San

Diego and Tulare are among the counties that have moved to this low-bid, flat-fee contracts.

- e. Another disturbing trend is that more and more counties are moving to the appointment of one counsel in capital cases.
- vi. Compliance with 4.117 by public defender offices is de minimis. It's questionable when you read the rule whether the public defender offices, when appointed, have to fill out the declaration and whether the Court has to make that certification when the public defender is appointed.
 - 1. In my informal survey of public defenders, most of them were completely unfamiliar with the rule and never filed a declaration.
 - 2. These orders, to the extent they are prepared, are not transmitted to judicial council.
 - 3. On data collection, if we want to know whether 4.117 is being complied with and to what extent it is or not, the capacity to obtain that information is there but the mechanism is not.

C. What does it cost to do a capital case at the post-conviction stage?

- i. In a rare reversal in 2004, Larry Lucas was granted penalty phase relief by the California Supreme Court. He was represented by Cooley Godward Kronish LLP, a firm with 600+ lawyers whose clients are mostly corporations.
- ii. The opinion details what firm did to establish Mr. Lucas' entitlement to penalty phase relief—10 pages of opinion, witnesses that were called, declarations, etc.
- iii. Spoke with [Charles Schaible](#), General Counsel at Cooley—what did it cost Cooley to do the case?
 - 1. Firm was appointed in March of 1994 and concluded litigation in June of 2005.
 - 2. It's lawyers expended 8,000+ hours, 7,000+ hours for paralegals.
 - 3. Firm would have billed over \$1 million according to existing Supreme Court rates.
 - 4. Cost of case in out-of-pocket was \$328,000.
 - 5. Unlike most lawyers who do these cases, solo practitioners, Cooley, a major law firm, had much of the infrastructure in house to hire the paralegals, case management people, case support staff, etc.

- 6. The \$328,000 grossly under-represents the expenses it took to achieve favorable results.
 - iv. The simplest way to describe the CA Habeas system is a statutorily-sanctioned, judicially-administered system of inequity where a small minority of clients receive representation consistent with guidelines where a majority do not. Currently, state agencies have 63 individuals whom they represent, private counsel represent 142 men and women on death row.
- D. Why is it that ABA guidelines require two counsel in capital cases?
- i. Defining principle in guidelines: death is different.
 - ii. What it takes to do a capital case is unlike any other case.
 - iii. If you accept and understand that principle, everything else flows inexorably and rationally from that principle.
 - iv. Why two lawyers, why a mitigation specialist, why investigators, etc.
- E. Wiggins, Rompea, Lucas, etc.
- i. All decisions accepted ABA guidelines as constitutional authority—that is, the ABA Guidelines are the constitutional norm for performance of counsel. That is a constitutionally-mandated standard.
 - ii. In the words of the ABA, these are not aspirational. It isn't elective; it's not optional.
 - iii. They apply from the moment of arrest forward.
- F. Questions have arisen about county systems vs. state systems
- i. When ABA guidelines talk about jurisdiction, they mean State not County.
 - ii. In view of guidelines, the only potential for equitable representation is a State system, whether we're talking about trial or post-conviction.
 - iii. It's the only system that can insulate defense counsel from undue political influence, whether judicial, supervisory, or otherwise.
- G. CA does not have legal representation plan that ABA guidelines contemplate
- i. We have a patchwork quilt of 58 counties.
 - ii. State system is administered by State Supreme Court, with regard to appointed counsel. Under guidelines, that is an impermissible conflict of interest.
 - iii. We don't have what the ABA guidelines call independent appointing authority or the type of supervisory authority that is free of political or judicial influence.

- H. Rule 4.117 and disconnect between guidelines and that rule
 - i. 4.117 does not require appointment of two counsel or requirement of counsel at all, much less at the initiation of case.
- I. With regards to qualification of counsel at the State level, there is a difference between Rule 8.605 which governs qualifications of counsel to take appeals and post-conviction cases. The guidelines require much more of a qualitative, than quantitative assessment of lawyers ability to perform.
- J. Not just rules that are problematic
 - i. CA Penal Code §987.9(d) means that there is a statutory presumption against appointment of two lawyers.
 - ii. Beginning in Keenan case in 1983, the CA Supreme Court has ratified that statutory presumption. Whether we are talking about public defender or contract offices, lawyers are situated where it is stacked against them when going to request co-counsel.
- K. In survey of counties...
 - i. 2nd lawyers are generally not assigned until after death is noticed.
 - ii. If approved, 2nd lawyers are generally limited to discrete tasks.
 - iii. Lawyers are carrying case loads that make it untenable for them to effectively represent their clients.
 - iv. Private lawyers have come to public defender offices asking those institutions to support two lawyers b/c of internal mechanisms that they have and discretion they have to shift resources.
- L. Habeas Corpus in regards to two counsel
 - i. 106 individuals do have habeas counsel, but only one attorney. Clearly violates guidelines.
- M. What does it take to do the investigation in a capital case?
 - i. Duties of post-conviction counsel, i.e. the whole ABA guidelines, applies to both trial and post-conviction lawyers.
 - ii. That means a thorough re-investigation of case.
- N. What's wrong at the trial stage? Reliance on flat-fee contracts
 - i. Problem is that the flat fees are set by judges in contravention of guidelines
 - ii. Must be set within weeks of tentative appointment in case.
 - iii. Prosecutors would agree that there is virtually little known about background and history through discovery.
 - iv. If flat fee is rejected by judge or administrator, the lawyers name goes next on list.

- v. When lawyers' name goes up for another appointment, the lawyer bids again and he is rejected, his name goes to bottom of list. Punitive system rewards lowest bid.
- vi. Appointment of 2nd counsel is prohibited under these contracts until death notice is issued.
- vii. Presumption against appointment of 2nd counsel, and their fee is limited to a percentage of what 1st chair receives, e.g. 15% of what 1st chair receives.
- viii. Contract includes things like coverage of investigation services, paralegal services, etc.
- ix. I will be submitting written testimony with more information shortly.
- x. In talking to lawyers in counties who no longer handle capital cases, they cannot afford to provide a level of representation that they believe the guidelines mandate.

O. Recommendation and Conclusion

- i. ABA Guidelines have to be enforced
- ii. They are the Constitutional and professional norm—must be done at every stage of proceedings
- iii. It requires a complete overhaul of capital representation in this State.
- iv. There is no option as far as the ABA is concerned, and at the trial level, as far as the CA Supreme court and SCOTUS are concerned.

P. Questions

- i. JVD: We've heard a lot about the needs for funding for investigation resources, etc. But you go back to reality of State budget system is that everything is being cut back. How is this going to be worked in with present situation? Obvious answer is to cut back on death penalty, but that may not be a political reality. We end up having a system that the abolitionists designed to make sure the death penalty was never exercised.
 - 1. that's one way to describe it, but you've heard from Laurence and Hersek that that's not what the defense counsel aims for.
 - 2. When ABA passed moratorium resolution, it had four bases for doing so:
 - a. One of them was failure to comply with ABA guidelines. That's where State of CA finds itself.

- b. Far be it for me to say where our resources should be put. Each of the State's needs are important, but so is the 6th amendment right to counsel.
- c. If we can't guarantee representation that people are entitled to, then the choice is clear.

XIV. Clay Seaman, California Appellate Defense Counsel (best viewed with his [letter](#) and [written submission of testimony](#))

A. Four Basic Points

- i. There aren't enough capital counsel to staff the current capital case backlog let alone influx of 14-20 new cases per year.
- ii. Available talent pool is too small to make up those numbers.
 - 1. The court appointed system has grown like topsy and was never intended to produce capital counsel on such a scale
 - 2. Pipeline for talent pool has been resource-starved for so long, it has no capability of producing the kinds of numbers the capital system needs today.
- iii. The talent pool that exists is likely to get smaller b/c of impending retirement of significant number of oldest, most experienced, and most cost effective post-conviction counsel. Current capital crisis is about as good as it's ever going to get.
- iv. There is no comprehensive to solve the crisis and there is no plan to make a plan.

B. Backlog of counsel

- i. Numbers of unrepresented—we need to find 80 counsel to do direct appeal, 80 more counsel to do habeas, and another 204 to do backlog of habeas.
- ii. Just in terms of habeas counsel, you need to find 284 counsel, which is half of death row.
- iii. Plus, you have to find another 80 for direct appeal.
- iv. You're up to finding 370 lawyers qualified to do capital post-conviction work
- v. Obvious solution: mine the talent pool!
 - 1. Options:
 - a. Either make the talent pool bigger so that more counsel is available, or
 - b. Extract more capital counsel from the existing talent pool

C. What is talent pool?

- i. The talent pool is not the criminal defense bar.

1. Appellate and habeas counsel are a very narrow slice of criminal defense bar.
 2. Vast majority of criminal defense bar are good trial litigators. Good trial litigators concentrate most of their time and efforts presenting facts in a visual medium of trial courtroom.
 3. Post-conviction counsel spend most of their time applying the law to the facts in a print-medium called the briefing process.
 4. Those are two entirely different skill sets. Like a player and coach, the skills are completely different but they share a common body of knowledge.
 5. With training and experience, you can master both, but that's the exception rather than the rule.
 6. Can't just go out and snag a trial litigator and anoint them as a post-conviction counsel.
- ii. What is the composition of the talent pool?
1. Former members of the OSPD that was down-sized under Gov. Deukmejian, a very well-qualified group of folks.
 2. Then there are some miscellaneous cats and dogs who have come to the capital process over the years, refugees from current administrations and some folks from NY or IL who were qualified to do that work in those States and have come to CA.
 - a. Common characteristic of this group is that it's static. We're not getting large new numbers of counsel into that talent pool.
 - b. They're taking replacement cases, i.e. finished with one case and ready for another
 3. More recent component of talent pool are people who spent most of their lives on the Court of Appeal panel.
 - a. Currently transitioning from appeal panel is the only way to get on capital post-conviction panel.
 - b. Reason is you have to have under Court Rules, 4 murder appeals, before you can be considered for the capital panel. The only way to get that is on the court of appeal panel.
 - c. The sweet spot for recruiting from the Court of Appeal panel is the older folks, the senior IV's and V's. There's only about 250 people at that level, not

nearly enough to staff the 370 backlog of cases that already exists.

- d. What you're starting to see now is that the Court has no choice but to recruit counsel below that sweet spot—counsel not as qualified as you'd like to see them.
4. Even though Court of Appeal panel is now the de facto pipeline for capital counsel development, it was never intended to provide capital counsel at all.
 - a. It still does not have as part of its mission providing capital post-conviction counsel.
 - b. There are no training programs in the Court of Appeal system to develop counsel for capital work and certainly not for habeas work. Capital work is not part of the Court of Appeal program.
 - c. Perhaps we could add some training courses to recruit people into the pipeline, but there may be no money.
 5. Virtually every project in Court of Appeals system has a waiting list of desirable, experienced recruits who want to do this work.
 - a. Potential recruits look at \$85 per hour and multiples that out by 1800 hour billable year. He comes out with a figure that is a little north than a \$150,000 per year.
 - b. Reality is different!
 - i. First year on panel, you'll be lucky to make \$40,000 b/c you don't have skill set yet.
 - ii. None of the projects will give you a full caseload.
 - iii. If you are a year or two out of law school and you're carrying up to \$200,000 of school debt, you can't afford to work in that system.
 - iv. You'll be lucky to make 1200-1300 billable hours in a year throughout your career. You don't get paid for the administrative tasks that have to be done in connection with your practice. You work 1800 hours and you only can bill 1200-1300. When you get older and start to do Bar and other civic things, 1000 hours looks good.

- v. Take 15-20% of top of \$85/hour for insurance, expenses, research, desk, etc.
 - c. Not terribly surprising that there is a lot of churn between Level I and Level III.
 - i. Not a lot of folks hang around to get to the Level IV and V
 - ii. Statistically, most folks on Appellate Panel will never get past Level III.
- 6. Even if you've worked hard, stuck with it, have the full caseload and earning the highest hourly wage, you've been on the Appellate panel 18 years and the Capital panel 10 years, when you account for inflation, you are now earning less per hour than you were as a rookie.
 - a. That is an unsustainable business model.
 - b. Practical effect for diminishing compensation over time—two ways to get a raise:
 - i. Get a raise!
 - ii. Cut your expenses
 - 1. For most, the biggest expense is housing.
 - 2. CADC—sponsors chapter in southern Oregon and Albuquerque, NM.
 - 3. Almost 1/8th of capital panel lives (20 counsel) live and work outside of CA.
 - 4. As tough as it is to make a living in California, it's virtually impossible to make a living doing habeas cases.
- 7. Last year, CADC took it upon itself, with the encouragement of CAP, to develop a pilot program to recruit habeas counsel
 - a. Pilot program to recruit habeas counsel—we left the original \$25,000 cap in place.
 - b. If Court adopted these recommendations, would you, the membership, sign up? No responses.
 - c. Went back to drawing board before rate was raised to \$50,000. We changed it and raised cap to \$50,000 for survey, would you now sign-up?. When we surveyed people, one person wrote back positively.
 - d. What counsel told us: as long as there is a cap which doesn't meet our expense requirement, we're not signing up.
- iii. As bad as things are now, the problem will only get worse

1. Gray-ing of panel
 - a. Retirement statistics from Court of Appeal panel: one quarter of Court of Appeal panel will be eligible in seven years, 2015.
 - b. These are the Level IV and Level V folks. These are precisely the folks that you would hope would transfer from the Court of Appeal panel to the Capital Panel.
 - c. There are no stats, of which I am aware, of avg. age of attorneys on capital panel. With requirements for experience, it stands to reason that Capital panel is that much older.
2. One of the most important considerations: length of time it takes to do capital work
 - a. If a capital case takes on avg. 10 years to get through State system and I want to retire at 70, well past normal retirement age, I have to take my last capital case at age 60.
 - b. For one quarter of capital panel, they have already taken their last or next to last capital case.
 - c. There are real costs associated with this capital problem, and not just availability.
3. Over 20 year career, counsel will earn an average of \$100,000 per year
 - a. For State of CA, it costs about \$2 million to develop one counsel with 20 years experience.
 - b. If one quarter of capital panel retires, that's \$80 million that walks out the back door.
 - c. If one quarter of the Court of Appeal panel retires, that's \$400,000,000 that just walked out the back door.
 - d. If pipeline is full, there isn't a problem. But we know that most counsel don't make it past Level III.
 - e. The figures I gave were yesterday's dollars. If you have to replace a quarter of the capital and Court of appeal panels on tomorrow's dollars, it will be very expensive.
4. Status quo is not an option. If we don't invest now, it will get hideously expensive.

XV. Cliff Gardner, Attorney at Law, involved in post-conviction.

A. Intro Comments

- i. Private lawyer that deals with post-conviction
 - ii. Private practice/criminal work for 28 years; capital defense for more than 20 years.
- B. Difficulties that private practitioners face:
- i. Funding
 1. When I get a capital case in post-conviction context, I sign-up for case.
 2. UPS delivers boxes (trial counsel's file), up to 200 boxes. It's the record on appeal, the trial court record.
 - a. I read this material and meet with client and family.
 - b. I come up with investigation plan to do habeas. That investigation plan is a wish list.
 - i. Talk to witnesses
 - ii. Hire an investigator
 - iii. Need a forensic criminalist to look at trace evidence
 - iv. Eyewitness id expert
 - v. False confession expert
 - vi. Serologist
 - vii. Ballistics expert
 - viii. Wound expert
 - ix. Pathologist
 - x. Mitigation specialist
 - xi. Mental health professionals
 3. Everything that I've said I need is something that should and could have been done at trial.
 - a. The funding should be there to do it at trial.
 - b. But if the funding is not there to do it at trial, I have to do it.
 4. It's not cheaper to do it 10 years later.
 - a. When I have to interview a witness 10 years later, the witness never move closer, they move further away—out of state, out of country.
 - b. It's more expensive to do investigation later, finding records, hourly rates of experts, etc.
 5. Struck by sincerity of Mr. Ramos. When he met with victims and makes decisions, he said that no decisions are based on money.
 - a. What a marvelous way to practice law.

- b. When I do a wish list, every decision I make is based on money.
- c. When I meet with a client and say here are the 42 things we need to do, we can only afford to do 7.
- d. That is an inequity that has to be addressed.
- e. Mr. Ramos is right that money should not be an issue in the prosecution of these cases, but it should be that way for the defense too.
 - i. It should be so at the trial and at the post-conviction level.
 - ii. I was struck by what he said b/c it hit me like a ton of bricks.
- ii. Agencies in CA that do this work
 - 1. HCRC and OPD are state of the art and gold standard
 - 2. When private lawyers see what they can do with resources and man-power, it's hard to take on representation of people knowing that they might get better representation elsewhere.
 - 3. There are probably private lawyers who are just as good, just as dedicated, etc. And there are. It's not a question of that; it's a question of access to resources, paralegals, experts, etc.

C. Focus Questions

- i. #5—If you want private counsel to shoulder burden, you have to fund at the level you would fund a public agency so that we have investigators, paralegals, etc. so that when we file a petition, if you don't win in State Court, at least you don't hurt the clients by filing a petition that doesn't have all the claims and facts that need to be in that petition.
- ii. #6—consistency of representation
 - 1. Great idea, but let me unpack some of the problems with consistency of representation.
 - 2. Problems
 - a. Skill sets to do federal vs. state work are different.
 - i. In Federal habeas, it's a civil procedure. Federal rules of civil procedure and evidence apply. There's a complex series of substantive rules that cover habeas claims.
 - ii. In state court, you're dealing with state substantive and procedural law.
 - iii. People aren't necessarily qualified on both.

- iv. If you require consistency so that counsel must do both, you might narrow available pool so that people do neither, which might exacerbate problem.
- v. Benefit is that system might work faster, but it won't work faster if you don't have counsel to handle these cases.
- b. Lack of resource centers
 - i. 10 years ago, there used to be resource centers to help private lawyers to do this area of law, but they are no longer there
 - ii. Very rare to have a private lawyer say they have the ability to litigate a death case.
 - iii. It's too complex to just pick up cold and litigate.
- c. Conflict problem
 - i. Often, when a claim is raised in Federal court, AG will argue that claim wasn't properly presented in State Court.
 - ii. One of the defenses is that counsel was ineffective in State Court for not presenting it properly.
 - iii. If the lawyer representing in State Court is the lawyer representing in Federal Court, you end up claiming IAC against yourself.
- iii. Focus Question #2—Supreme Court's suggestion to amend Courts of Appeal to handle capital cases.
 - 1. Chief described backlog problem in accurate and passionate terms.
 - a. It's remarkable b/c 7 justices with excellent staffs, each with four or five lawyers that are as skilled a lawyer as you'd want to meet, the 7 justices have been resolving cases for years, they have a central staff that is devoted to capital work, and with all these good people doing all this good work, and we still have a backlog.
 - b. Justice Kogan from Florida said that the problem was not at the end but at the beginning, with the breadth of the statute.
 - 2. Two practical difficulties with Court's proposal

- a. 1996 amendments to Federal Habeas Law
 - i. Statute of Limitations—now in Fed court, you have one year to get into Fed Court from the date conviction is final in State appeal.
 - ii. The problem with sending these to appellate courts is that you will get system speeding up, but then lack the habeas counsel to preserve rights in Federal Court.
 - b. Solution: delay transfer back until habeas counsel is appointed. At least you will minimize risk.
 - D. Chief mentioned that no one part of the post-judgment scheme can be fixed without considering its impact on the entire scheme.
 - i. Can't fix appellate problem without considering impact on habeas scheme.
 - ii. Consider that all these things must be looked at together.
- XVI. Public Comment
 - A. Steve Rohde
 - i. constitutional lawyer, co-counsel in Federal Habeas Corpus case of *People v. McDowell*, member of clemency team for Stanley Williams.
 - ii. Speak to you today on behalf of the Progressive Jewish Alliance founded in 1999 to educate, advocate, organize around issues of peace and equality and diversity and justice. Also appear on behalf of inter-faith communities for justice and peace.
 - iii. These organizations believe this is a deeply flawed system.
 - iv. Grateful to Commission for comprehensive work on criminal justice system in general and death penalty in particular.
 - 1. Grateful for issuing of interim reports which have been instrumental in drafting reform.
 - 2. Unfortunately, those reforms have been vetoed.
 - v. There have been other commissions that have done hard work that you are doing here.
 - 1. IL issued a similar report in April of 2002.
 - a. 85 critical recommendations were made.
 - b. Six years later, the vast majority of recommendations of IL have not been enacted.
 - c. We cannot overlook crucial statement by IL commission when it concluded its work, “The Commission was unanimous in belief that no system, given human nature and its frailties, could ever be

devised or constructed, that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death.

2. This Commission has no limit to mandate to look at death penalty.
 3. Words of Justice Harry Blackmun (1994), “From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years, I have endeavored, indeed I have struggled, along with a majority of this Court, to develop procedures and substantive rules that would lend more than mere appearance of fairness to the death penalty endeavor. Rather than to coddle the Court’s delusion that the desired level of fairness has been achieved, and the need for regulation eviscerated, I feel morally and intellectually obliged to concede that the death penalty experiment has failed.”
 4. I urge this Commission in addition to your findings to echo the words of the Illinois Commission, to realize that your hard work may also go unheard, that your reforms may not be adopted, and therefore, you should recommend that if that is what the political branch does, to vastly ignore our recommendations, then we should recommend that the death penalty be abolished.
- vi. JVD: A number of the recommendations we have made have gone to the whole spectrum of criminal cases.
1. We’ve talked about eyewitness identification, jailhouse informants, the DNA/forensic work.
 2. Our goal was to think of safeguards throughout system.
 3. While the bills were vetoed, my sense is that over time the law enforcement community will pick up on these recommendations. We’re going back to the Legislature this year. We’re trying to work with law enforcement.
 4. This is a process that is on-going.
 - a. As in IL, Tom Sullivan who came here to help us on false confession/interrogation issues, he reported that 500 police departments across the country are using those interrogation mechanisms for recording to their advantage and to the advantage of justice and the law enforcement folks that use it.
 - b. We have to keep the pressure on.

- B. Ramona Ripston (best viewed with [her written submission](#))
- i. Executive Director for 35 years of ACLU of Southern California.
 - ii. Parent, grandparent, university professor, and a member of the California Commission on Judicial Performance.
 - iii. From those vantage points, I have seen divisive battle after battle over CA's death penalty.
 1. I have seen evidence showing that race and geography factor into the decision to both seek and impose the death penalty.
 2. And wealth and privilege help determine if a defendant is found guilty or innocent.
 3. I have seen a dozen death row inmates exonerated and have worried about how many wrongfully convicted have been wrongly executed.
 4. I've seen vast amounts of money poured into a dysfunctional death system while our police and our schools have gone wanting for funds.
 5. I've seen riots over the Rodney King verdict and outrage over the Ramparts scandal.
 6. I've seen angry protests, vigils, and Court battles over the unequal administration of justice.
 7. I've seen this and more shatter the public's faith that CA's justice system is fair and equitable.
 - iv. The ACLU represents 100,000 members throughout CA who rely on us to vindicate fundamental principles like due process and equal protection.
 1. Given what I know, we cannot say that equal protection and due process are being upheld in our death penalty system; indeed they seem to be regularly violated.
 2. This Commission has made intelligent, rational reform recommendations to reduce the likelihood of wrongful convictions.
 3. Through improving the methods of eyewitness identification, interrogation, and use of informant evidence, but rationality was trumped by political concerns. Regretfully, your sound proposals were vetoed.
 4. Even if you could reform the system, no reforms could remove the specter of executing the innocent, which hangs over our death rows. That is an error no reform can reverse, no law can remedy.

5. Executing innocent people is a reckless risk that no society should take. Most societies around the world have increasingly moved beyond state executions, leaving our system not only cruel, but unusual.
 6. LWOP is still a sentence of death. But death in prison is less divisive and reduces the possibility of wrongful convictions.
 7. The reliability of a death penalty that may kill an innocent person cannot be trusted. The fairness of a death penalty where bias is inherent can't be trusted. The wisdom of a death penalty that needlessly perpetuates state violence when better alternatives are available cannot be trusted.
- v. CA's death penalty system is arbitrary, biased, expensive, and susceptible to fatal error. We cannot fix it; we must not tinker with it; we must end it.
 - vi. JVD: Natasha Minsker of the ACLU has presented three documents to us regarding [prosecutorial misconduct in death penalty cases](#), [charging practices of district attorneys in death penalty cases](#), and [comparative proportionality review in death penalty cases](#). She will speak at our March hearing at Santa Clara.

C. Mike Farrell

- i. President of Board of Directors of Death Penalty Focus, co-Chair emeritus of Human Rights Watch locally, and a former member of Commission on Judicial Performance.
- ii. I deplore state killing because it harms our society, not only by coarsening the judges, wardens, and killing teams who implement it, but by lowering our standards, most tragically exemplified in the tortures inflicted by young Americans in Iraq, Guantanamo, Afghanistan, and other sights across the world.
 1. Inhumane acts endorsed by the highest authority, rationalized by the claims that some human beings, because of presumed or sometimes actual behavior, have been so sullied that they can be dealt with in any monstrous manner we select.
 2. Though legal, the death penalty's impact on our standards increasingly troubles juries, judges, lawyers, and per Joshua Marquis of the National DA's Association, prosecutors themselves, and with good reason.

- iii. With you, I heard Chief Justice George say that our system was dysfunctional due to a backlog that must be cleared up or it would become worse and worse and worse.
 - 1. Justice George would tinker with the machinery of death to solve his own problem but in so doing ignore the underlying failures in the very system he is trying to expedite. The disproportionality, the racial and class bias, the constitutionally mandated expense that makes it vastly more costly than its rational alternative, LWOP, the imbalance with the full resources of the State arrayed against underfunded indigent defenders, about which you heard, all of which if resolved, could ease the problem that the Justice finds so vexing.
 - 2. Nor does he seem aware that his proposal might exacerbate the caprice, the glaring inconsistency of application, that plagues our system.
 - 3. The Justice could not say how much his fix would cost. Ironically, his proposal came on the same day that Gov. Schwarzenegger announced a \$14 billion shortfall in the State's budget, now reportedly expanding, suggesting that the Chief's proposal will suffer the same fate as many of those on death row.
- iv. In a personal letter to me in 2004, Gov. Schwarzenegger said that abuse and incompetence worked to undermine the fair and impartial application of the law in some States, but, he believed California's administration of the death penalty are free from the kind of systemic defects that have called its accuracy into question elsewhere.
 - 1. Despite what we all know, despite its condemnation by Judge Fogel, despite the quandary of Chief Justice George, he remains married to that belief today.
 - 2. In an act of political legerdemain, the Governor says his fiscal emergency requires cuts in education, funding for children, welfare recipients, the blind, the disabled, wildlife, and our State Parks, yet he clings tenaciously to \$136 million for a new death row that will cost three times that much.
 - 3. Some years ago the political guru of another Governor in another State, after hearing our case for the innocence of a

condemned man, “in politics, the death penalty only cuts one way, you kill”

- v. As you nobly labor here to fit the square peg of the fair administration of justice into the round whole of state killing, I urge you to consider that our death penalty is not about justice, it’s about politics...and more to the point, political cowardice.

D. Aba Gayle

- i. mother of murder victim, member of Murder Victims’ Families for Human Rights (MVFHR), and California Crime Victims for Alternatives to the Death Penalty (CCVADR), in addition to many other organizations.
- ii. I care deeply about California. My children are 5th generation Californians born in San Mateo.
- iii. My youngest child, my daughter Catherine, was murdered just outside Auburn, California.
 - 1. She was 19 years old. I went through all the normal stages of grieving until I got stuck in anger, rage, and the lust for revenge. This happens to many murder victims’ family members because of the death penalty.
 - 2. The District Attorney promised me that they would catch the man who murdered Catherine, put him on trial, find him guilty, and put him on death row.
 - 3. He said execution would bring closure and I would be alright again.
 - 4. The man who killed Catherine in 1980 is still on death row. He has been there since 1983.
 - 5. After 12 years of anger and rage, I had a spiritual epiphany and I was able to forgive the murderer.
 - a. I wrote to him and told him how much the loss of Catherine meant to her family.
 - b. I told him I found how I could forgive him.
 - c. I ended the letter by saying that the Christ in me sends blessings to the Christ in him.
 - 6. The act of writing that letter gave me instant healing.
 - a. Since writing that letter, I have visited San Quentin Death Row visiting room many times. This man is not a monster. And the man who murdered Catherine no longer exists.
 - b. He has expressed such deep remorse and often weeps when he tells me how deeply sorry he is.

- c. He tells me that he would gladly give his life this instant if it would in any way undo that night.
- d. Late in the year 2005, the Fed Dist. Court ordered a new penalty phase trial for him.
 - i. I wrote to DA and asked not to go for death penalty
 - ii. I explained that I did not want a state-sanctioned premeditated murder to tarnish the memory of my beautiful child, that I was against the death penalty, and would be comfortable with a life sentence.
 - iii. I explained that my entire family is against the death penalty. The DA replied that he was requesting the AG of CA to appeal the Federal District Court ruling. My request was ignored.
- iv. I close by asking you to understand that an execution will bring my family and myself further pain.
 - 1. I beg the people: do not kill in my name.
 - 2. But more important: do not kill another human being in the name of my precious child.

E. Vera Ramirez-Crutchner

- i. Mother of a murder victim. I am older than all of you here.
- ii. I have been working against death penalty since 1986.
- iii. One of my five sons was killed.
 - 1. My son went to a party one block from our house. He had just moved into his apartment and he was a 22 year old cabinet worker with his own car, own apartment, etc. He had gone to a party. Girlfriend had to go to car. She was encountered by strangers and locked herself in car. She honked horn and screamed. The men tried to get in car. My son and his friends came out. The man who was slashing his tires knifed him in the stomach. He tried to escape and was shot twice.
 - 2. His younger brother called me and we went to the hospital. We weren't allowed to see our son.
- iv. I love to talk to young people. You explain to them how it makes you feel to kill a person. When you have a death penalty, you are sanctioning a murder. I don't want my name on a list that says the murderer who killed my son can be murdered by the State.

F. Tim Spann

- i. Work with Amnesty Int'l on the death penalty issue, to abolish it worldwide.
- ii. Amnesty Int'l was formed in 1961 to assist people who have experienced human rights abuses around the world. Our work is based on the Universal Declaration of Human Rights (UDHR), written in 1948 after WWII.
- iii. Art. V says that everyone has the universal right to life. There are no special circumstances that come into play with the UDHR.
- iv. Worldwide perspective: EU has abolished death penalty. No members of union allow countries with death penalties to join union. The rest of the industrialized world has abolished the death penalty.
- v. Crime rates where death penalty had been abandoned, including Canada in 1976, have found that their crime rates have dropped. That should be examined by this Commission.
- vi. If you examine all the issues that come into play, state killing is not a good example for people to behave themselves. That's the way it reads to me.
- vii. I work with victims. I'm looking for fewer victims.

G. Mike Peddecord

- i. Professor emeritus of public health at San Diego State University.
- ii. In my career over 25 years, I've authored over 50 peer-reviewed publications in journals such as the American Medical Association and the American Journal of Public Health.
- iii. Today, I want to assure the Commission that there is no credible research that supports the long-standing public myth that the death penalty deters murder or protects our communities.
 - 1. As a researcher, I ask the question, "how valid is the evidence that supports this widespread public perception?"
 - 2. My judgment on this topic is informed by my education, my judgment, and my statistical training.
 - 3. In reviewing recent published studies, I've found like so many other academics that there is no credible evidence that death penalty or executions per se deter future murders or crime in our communities.
 - 4. In addition, it is my judgment that many of the econometric studies published on this topic are fundamentally flawed.
- iv. In [my written submission](#), I lay out some of my concerns. My six major concerns are:
 - 1. The Human Behavior Fallacy

- a. most deterrent studies falsely assume that potential murders are deterred because they think rationally about the benefits of their crime vs. the possibility of the consequences.
 - b. This assumption is not grounded by any behavioral research.
 - c. Findings are not consistent—if there was a meaningful relationship between capital punishment and lower murder rates, we would expect to find repeatable results across many states in many studies. We do not.
2. Studies use inappropriate data
- a. Most studies are fundamentally based on the FBI-type crime reports, census data and a hodgepodge of other sources.
 - b. This information was never intended for testing theoretical hypotheses, let alone informing public policy on the death penalty.
3. Aggregated data fallacy
- a. data are almost always collected at county or at State level, not into information on individual cases.
 - b. As such, these studies pool data from vastly different communities.
 - c. Such approaches are never useful in establishing cause and effect relationships in the health sciences, with which I am familiar.
4. Statistical Control Fallacy
- a. In order to avoid apples and oranges comparisons, econometric studies attempt to adjust for conditions across different counties and states.
 - b. Given the state of the data, these are unsatisfactory.
5. Speculative and Theoretical Studies
- a. Proponents use speculative and theoretical studies to support death penalty.
 - b. I suspect that few of the academicians who produced these studies would have used their work in this way.
 - c. I am not alone in my conclusion. I would also recommend to the Commission the 2005 critique of these studies in the Stanford law review. I've cited this in my written submission.

- v. In conclusion, I encourage the Commission not to be swayed by any argument that the death penalty makes our community any safer or deters the death penalty.
 - vi. JVD: we are not going to be making specific recommendations regarding the morality of the death penalty. We are going to be pointing out a lot of the issues and problems we have encountered in studying it. It can lead the policymakers in a number of different directions. The kinds of issues you are raising here will be put up on the website and made available.
 - vii. Peddecord: the purpose of my comments is to make clear that there is no credible evidence that the death penalty serves as a deterrent.
- H. Rev. Howard Dotson (best viewed with [his written submission](#))
- i. Thanks to councilman Rosenthal who joined us for a press conference out front. He supports [CA People of Faith](#) and Death Penalty Focus.
 - ii. As People of Faith, we urge Commission to recommend abolition of death penalty. We understand mandate of this Commission. As a minister, I pray that some of the moral issues can be heard, even though it isn't part of your mandate.
 - iii. You've heard hours of testimony outlining problems with death penalty.
 - iv. Throughout CA, people of color are disproportionately sentenced to death. We must protect the innocent from being wrongfully convicted.
 - v. It is chillingly sober to reflect on errors we've already made, mistakes we can never reverse.
 - vi. As a person of faith, I've walked with 17-18 families where mothers are grieving because they've lost children to gang violence. Just last September to December, we lost 15 families in 14 weeks. Grief is too raw for mothers to come here today.
 1. They want children in community to graduate, to get into programs so at-risk youth will not kill another child.
 2. Daniella Garcia is a mother of a three week old baby in September. She is struggling, relapsed, and on the street. The pain of grief is unbearable. What she wants to see is that other children can have a better life and path to peace and prosperity.
 - vii. As we consider budget crisis and how untenable it is for our current system, we can use those resources in communities so that our children can prosper. 50% of LAUSD that are Latino and

African American will not graduate. 90,000 of our youth are not in school or gainfully employed.

- viii. We need restorative justice. Jesus of Nazareth was wrongfully convicted. We need to embrace the grace and redemption that's possible. Tooky Williams showed us what's possible. It's never too late.

I. Chester Lovelle Talton

- i. Bishop Suffragan of Episcopal Diocese of Los Angeles
- ii. Anglican Communion, of which our church is a part, has taken a position by which it condemns the death penalty as inhumane and contrary to Christian teaching concerning the sacredness of human life. Therefore we do not accept retribution or human vengeance as a justification for taking human life.
- iii. The death penalty falls unfairly on marginalized people, poor, uneducated, ethnic and racial minorities, and persons with mental and emotional illness.
- iv. Death penalty is subject to error. Innocent persons condemned to death row have been found to be innocent as a result of DNA testing and had to be released.
- v. One wrongful death in this manner is too high a price for society to pay.
- vi. It is more expensive to keep prisoners on death row awaiting execution than to keep them in prison for life.
- vii. DP has not proved to be a deterrent to crime.
- viii. Families of victims of crime do not always seek vengeance and retribution.
- ix. As a person of faith, who believes that all life is sacred, that every human being must be treated with dignity, we cannot but oppose state killing.
- x. I urge this commission to make your recommendation to be one of abolishing the death penalty.
 - 1. There must be consequences for crimes against society. The death penalty, with its finality and subjectiveness to error, is not one of them
 - 2. All bishops of Episcopal diocese of Los Angeles join me in voicing their opposition to the death penalty.

J. Mary Ann Hughes

- i. Mother of a victim.

- ii. Four years ago this February, our family was up in San Francisco waiting to go to San Quentin for the execution of Kevin Cooper for killing my 9 year old son.
 - 1. Hours prior to the execution, the 9th Circuit sent the case back to San Diego for short tests that would do away with questions of guilt and innocence for good.
 - 2. Four years later, we've heard testimony in San Diego where nothing new was learned. Cooper's conviction was upheld
 - 3. Another appeal to 9th Circuit—a year waiting for that decision. Recently the conviction was upheld again.
 - 4. Now we wait again to see what kind of stalling techniques Kevin Cooper and his defense will come up with next.
- iii. In 1983, my 11 year old son Christopher left on his bicycle with his friend Josh Ryan. They were going to a sleepover and were excited. The only instructions they had was to make sure they were back in time for Church.
 - 1. When my son didn't come back the next day, I was angry. I started getting concerned.
 - 2. I sent my husband to find where my son was. I realized that something horrible had happened as I saw police and fire going up the street. My husband came down to let me know what kind of nightmare he found at the Ryan home.
 - 3. Our 11 year old son, dead. Peg and Doug Ryan, dead. 10 year old Jessica Ryan, dead. 9 year old Joshua Ryan still alive with his throat slit on the floor, lying on the floor the rest of the night with his dead family and friend around him.
 - 4. We've lived with this nightmare for over 25 years while legal system has been manipulated by Kevin Cooper's defense team.
 - a. Cooper had escaped from Chino Institute for Men when he escaped from prison.
 - b. He hid in a house until someone could come get him out.
 - c. When he couldn't get anyone to help him, he snuck down to Ryan house and murdered everyone.
- iv. Every part of our legal system has upheld Cooper's conviction. He and he alone murdered my son and the Ryan family.
- v. Can you be sure that someone like Kevin Cooper if not on death row would not murder again?

- vi. I attended 16 weeks of preliminary hearing, trial, post-conviction hearings in San Diego.
- vii. I know by going through all of this that Christopher was probably one of the last people killed in that house. What kind of terror does a 11 year old child have to face when a madman is chasing him with an axe?
- viii. What can you guarantee me that this won't happen to someone else?
- ix. The only way for this to come to an end is when the state carries out the death penalty and people like Kevin Cooper is finally off the face of the Earth.

K. Linda Hubbard Lingford

- i. Mother of my daughter and her friend in 1980.
- ii. In 1981, trial happened. In 1989, the second trial occurred.
- iii. April 12, 1980 seems like a long time ago.
 - 1. My beautiful 7 year old daughter, Linda Christine Hubbard, was murdered and taken away from our family.
 - 2. She was one of two victims of Philip Lucero in one day. He killed two children.
- iv. Some of us have such a hard time dealing with this that our lives are in shambles.
 - 1. Some of us go through divorce because we can't cope with this loss.
 - 2. Approximately 85-90% divorce rate in these families. The crime tears families apart. This tears families apart. Then you have to explain to younger child what happened.
- v. Why do we, victims of judicial system, have to face this circus of a process? Why do we, as taxpayers, have to pay for care and protection at a tremendous amount of money for these murderers?
- vi. Lucero's death will not bring back our victims.
- vii. When the system decides to put these people who commit horrid crimes to death, we as parents will breathe a bit easier.
- viii. You will not get compassion and understanding about why Lucero should stay alive, not from me. He committed two crimes in one day.
- ix. I request justice for my daughter and her best friend and ask that the death sentence be carried out.

L. Rev. Paul Sawyer

- i. These stories almost bring us to tears to hear them.

- ii. My father was a lawyer. When I was a child, he read to us the cases of Sacco and Vanzetti who had been put to death unjustly by the State of Massachusetts and the case of Leopold Lloyd, about two young men who killed someone to prove how superior they were. Darrow defended them and pointed out that young men had been trained in colleges to have these ideas and that they acted out in this way and that there should be mercy.
- iii. My father taught me that the law is entirely related to morality, from Hammurabi, the great code giver of Babylon, down to the common law.
 - 1. If one person was killed innocently out of the death penalty, the whole system was done for.
 - 2. A fundamental principle of the common law: if there is new evidence discovered, the person has a right to a new trial.
 - 3. That is completely taken away by the death penalty, a fundamental human right eliminated by killing a person.
- iv. All great religious teachers have taught us not to kill (10 commandments, Jesus of Nazareth in Sermon on the Mount—loving your enemies, the Buddha, Laot-ze). It's in the Declaration of Human Rights. We honor these religious teachers because they set a light ahead of where we are as a human society, as the possibility for what humans beings can become.
- v. It's worse for the State to take a life than for someone in an act of craziness to kill somebody, b/c it's done cold bloodedly and it's done by those who are the standard of what human life should be.
- vi. When we murder someone out of death row in a cold-blooded way, there are circumstances in which it's ok to kill.
 - 1. It's a slippery slope downward for anyone else to say that the State does it.
 - 2. I've got my reasons and they're pretty good, not reasonable, but out of that passion.
 - 3. I remember picking up a kid and throwing him across the pool table. In that instance I wanted to kill him. I had a real lesson that day. There but for fortune go I...any one of us could have been in that same position.
- vii. Warden Duffy, the great warden of San Quentin, said that the murderer was the most rehabilitate-able person b/c their acts grew out of immediate passion. Unlike the petty thief or whatever, usually there were exceptions, it didn't occur again. You cannot

avoid the moral question because the law and justice are entirely to do with morality.

viii. The end result of killing by State is that there is no way to set it up in a just fashion. The end result is totally immoral—killing of human being. We've great feeling for the women who spoke here for losing their children. It's the worst thing that could ever happened. And we're pleased that it has never happened to us.

ix. But there's no way that killing will bring them back.

XVII. JVD: many thanks to our afternoon speakers. Clearly every one of the victims we heard from today suffered great pains as a result of the judicial system.

Conclusion of Hearing